CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 610

ANGELUS MILLING COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1944.

CERTIORARI GRANTED DECEMBER 4, 1944.

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THE TAX COURT OF THE UNITED STATES
WASHINGTON

ANGELUS MILLING COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398 P.T.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 132, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of Sept. 1943.

B. D. GAMBLE,
Clerk,
The Tax Court of the United States.

(SEAL)

ANGELUS MILLING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 398 P. T.

Appearances:

For Taxpayer: Prew Savoy, Esq., 5-17-37, 629 Munsey Bldg., Washington, D. C.

For Commissioner: J. P. Wenchel, Esq., Raymond F. Brown, Esq., Lloyd C. Hood, Esq.

Docket Entries

1941

Aug. 20—Petition received and filed. Fee paid.

Aug. 20—Two copies of petition served on Chief Counsel, Bureau of Internal Revenue.

Oct. 4—Respondent filed motion for better statement of claim.

Oct. 6—Copy of motion for better statement of claim and motion notice giving each party to and including October 27, 1941 within which to file a brief and October 20, 1941 to request oral argument sent petitioner by registered mail, No. 307,245.

Oct. 6—Copy of motion notice sent to respondent by registered mail, No. 307,247.

Oct. 27—Petitioner filed motion to extend time within which to reply to respondent's motion for better statement of claim.

Oct. 27—Copy of order extended time of each party within which to file brief or request oral argument to and including November 26, 1941, sent to petitioner and respondent by registered mail, Nos. 307,291 and 307,293, respectively. Copy of petitioner's motion for extension sent to respondent by registered mail, No. 307,293.

Oct. 27—Respondent filed memorandum brief in support of motion for better statement of claim.

Oct. 30—Copy of notice setting hearing on merits at Washington, D. C., March 16, 1942 sent to petitioner and respondent by registered mail. Nos. 307,302 and 307,303, respectively.

Nov. 21—Petitioner filed amendment to petition in response to respondent's motion for better statement of claim.

Nov. 21—Two copies of amendment to petition served on respondent.

Nov. 26—Respondent filed motion for renewal of motion for better statement of nature of claim to apply to petition as amended.

Nov. 26—Copy of above motion and motion notice giving each party to and including Dec. 10, 1941 within which to file a brief, and Dec. 8, 1941 to request oral argument sent to petitioner by registered mail No. 307,362.

Nov. 26—Copy of motion notice sent to respondent by registered mail, No. 307,363.

Dec. 2—Petitioner filed request for oral argument with respect to respondent's motion filed November 26, 1941.

Dec. 2—Copy of order setting oral argument Dec. 19, 1941 with respect to respondent's motion filed November 26, 1941 sent to petitioner and respondent by registered mail Nos. 307,776 and 307,377 respectively. Copy of petitioner's request sent to respondent by registered mail, No. 307,377.

Dec. 5—Petitioner filed memorandum in reply to "Renewal of motion for better statement of nature of claim to apply to Petition as amended."

Dec. 9—Respondent filed memorandum brief in support of his motion filed November 26, 1941.

Dec. 9—Chairman assigned member Crewe a Division of One to decide Respondent's motion filed Nov. 26, 1941 and conduct the oral argument with respect thereto.

Dec. 19—Oral argument held before member Crewe. Petitioner granted permission to amend petition on or before Dec. 30, 1941, Respondent's motion filed Nov. 26, 1941 to apply to same.

Dec. 29—Petitioner filed motion for leave to file amended petition.

Dec. 29—Petitioner filed amended petition.

Dec. 30—Two copies of amended petition served on Chief Counsel, Bureau of Internal Revenue.

1942

Jan. 16—Petitioner filed "Verification of Amended Petition sworn to by R. A. O'Connor, Pres."

Jan. 16—Two copies of above "Verification" served on respondent.

Jan. 20—Copy of order denying respondent's motion filed Nov. 26, 1941, and giving him to and including February 16, 1942 within which to answer sent to petitioner and respondent by registered mail, Nos. 307,573, and 307,572, respectively.

Feb. 11—Copy of notice changing hearing on the merits to April 27, 1942, sent to petitioner and respondent by registered mail, Nos. 307,614 and 307,615, respectively.

Feb. 16—Respondent filed motion to dismiss the petition.

Feb. 16—Copy of motion to dismiss and motion notice, giving each party to and including March 9, 1942 within which to file a brief and March 2, 1942 to request oral argument sent to petitioner by registered mail, No. 307,621.

Feb. 16—Copy of motion notice sent to respondent by registered mail, No. 307,622.

Feb. 20—Petitioner filed request for oral argument on respondent's motion filed February 16, 1942.

Feb. 20—Copy of order setting oral argument March 13, 1942, sent to petitioner and respondent by registered mail Nos. 307,635 and 307,636, respectively. Copy of petitioner's request for such argument sent to respondent by registered mail, No. 307,636.

Feb. 23—Respondent filed motion for postponement of filing brief and written request for oral argument.

Feb. 24—Copy of order extending time for filing briefs to May 9, 1942 and continuing oral argument from March 13, 1942 to May 15, 1942 sent to petitioner and respondent by registered mail, Nos. 307,645 and 307,644 respectively. Copy of respondent's motion for such continuance sent to petitioner by registered mail No. 307,645.

April 7—Copy of notice changing hearing on the merits to September 21, 1942, at Washington, D. C., sent to petitioner and respondent by registered mail Nos. 307,714 and 307,713, respectively.

May 4—Respondent filed motion for extension of time for filing briefs and postponement of oral argument upon motion to dismiss.

May 4—Copy of order extending time for filing briefs of each party to and including May 29, 1942 and continuing oral argument to June 4, 1942 sent to petitioner and respondent by registered mail, Nos. 307,747 and 307,748 respectively. Copy of respondent's motion sent to petitioner.

May 29—Petitioner filed memorandum in opposition to motion to dismiss the petition.

May 29—Respondent filed memorandum brief in support of his motion to dismiss the petition.

May 29—Chairman assigned member Edwards, a Division of One, to decide respondent's motion to dismiss the petition and to conduct the oral argument.

June 4—Oral argument held before member Edwards. Prew Savoy, Esq., argued for petitioner. Lloyd C. Hooks, Esq., and Broadlove Smith, Esq., argued for respondent.

June 12—Petitioner filed verification of petition

June 12—Two copies of verification of petition served on respondent.

July 25—Respondent filed motion to permit prior motions, filed January 5, 1942 to apply to petition as amended July 8, 1942.

July 27—Above motion marked "Granted" and copy sent to petitioner and respondent by registered mail, Nos. 307,862 and 307,863, respectively.

Aug. 5—Copy of order denying respondent's motion filed February 16, 1942 and giving respondent to and including August 24, 1942 within which to answer, with copy of dissenting memorandum of Schwartz sent to petitioner and respondent by registered mail, Nos. 307,823 and 307,824, respectively.

Aug. 5—Copy of motion continuing hearing on merits at Washington, D. C., to November 17, 1942 sent to petitioner and respondent by registered mail, Nos. 307,825 and 307,826, respectively.

Aug. 21—Respondent filed answer to the petition.

Aug. 21—Copy of answer served on petitioner by registered mail, No. 307,894.

Oct. 22—Copy of notice changing hearing on merits from November 17, 1942 to February 8, 1943, sent to petitioner and respondent by registered mail, Nos. 307,984 and 307,990, respectively.

1943

Jan. 29—Motion for a continuance sine die filed by General Counsel.

Jan. 29—Motion to dismiss on jurisdictional grounds filed by General Counsel.

Jan. 29—Brief in support of motion to dismiss on jurisdictional grounds, filed by General Counsel.

Feb. 1—Motion for continuance sine die—granted.

Feb. 3—Hearing set February 17, 1943 on motion.

Feb. 17—Hearing had before Judge Murdock on motion of respondent to dismiss, argued. C. A. V. Petitioner's memo. filed.

Feb. 18—Copy of memorandum served on General Counsel.

Feb. 27—Transcript of hearing 2-17-43 filed.

Mar. 22—Agreed motion to correct transcript of argument on motion to dismiss on jurisdictional grounds, filed. 3-23-43 granted.

May 4—Opinion rendered—Murdock, J. Div. 3. Proceeding must be dismissed for lack of jurisdiction. 5-4-43 Copy served.

May 4—Order of dismissal for lack of jurisdiction entered. Murdock, J. Div. 3.

July 27—Petition for review by U. S. Circuit Court of Appeals 2nd Circuit, with assignment of error filed by taxpayer.

July 27—Proof of service filed by taxpayer.

July 27—Statement of evidence lodged.

July 27—Notice of lodgment of statement of evidence and the Court may fix a date for a hearing on the statement, filed by taxpayer with proof of service of notice and statement of evidence thereon.

July 27—Praecipe for record filed by taxpayer with proof of service thereon.

Aug. 6—Objections to petitioner's proposed statement of evidence filed by General Counsel with affidavit of service attached.

Aug. 6—Objections and proposed corrections with respect to petitioner's praecipe for transcript of record filed by General Counsel with affidavit of service attached.

Aug. 6—Praecipe for additional matter to be incorporated into transcript of record, filed by General Counsel with affidavit of service attached.

Sept. 16—Statement of evidence lodged.

Sept. 16—Corrected praecipe for transcript of record filed by taxpayer with proof of service thereon.

Sept. 22—Agreed statement of evidence approved and ordered filed.

Sept. 22—Order enlarging time to October 15, 1943 to transmit and deliver the record, entered.

FILED
2:30 P. M.
August 20, 1941
United States Processing
Tax Board of Review

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 398

The above-named Petitioner hereby petitions, under the Revenue Act of 1936, for a hearing on the merits of its claim for the refund of processing tax on wheat, paid under the Agricultural Adjustment Act of May 12, 1933, as amended, together with interest thereon, and as a basis for this proceeding alleges, as follows:

1. Petitioner is a corporation organized and existing under the laws of the State of New York, with its principal office at Niagara Falls, New York.

2. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner was a processor of, and processed, wheat under the name of Middleport Flour Mills, Inc., now Angelus Milling Company.

3. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner paid, or had paid for its account out of its own monies, to the Collector of Internal Revenue, Buffalo, New York, processing taxes on wheat, on account of processings of wheat by it, in the sum of $145,839.12.

4. On or about January 29, 1936, claims were filed on Form 843 by Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc., for the refund of processing taxes on wheat in the total sum of $454,045.27 (EXHIBITS A-1, 2 and 3 attached) paid on account of the processing of wheat by them.

5. After the passage of the Revenue Act of 1936, and prior

to January 1, 1940, Niagara Falls Milling Company filed a claim for the refund of processing tax in the sum of $436,231.73, with the Collector of Internal Revenue at Buffalo, New York, paid on account of the processing of wheat by it and by Angelus Milling Company, formerly Middleport Flour Mills, Inc. (EXHIBIT B attached)

6. After the passage of the Revenue Act of 1936, and prior to January 1, 1940, i. e. on or about August 16, 1938, Angelus Milling Company filed a claim for the refund of $145,839.12, paid by it, or for its account, out of its monies, on account of the processing of wheat by it, with the Collector at Buffalo, New York, designating this claim as "Amendment to Claim". (EXHIBIT C attached)

7. Under date of May 24, 1941, the Commissioner, in a letter sent by registered mail, disallowed the claim mentioned in paragraph 6, in its entirety. (EXHIBIT D attached)

8. The taxes involved are processing taxes paid on the first domestic processing of wheat. The amount in controversy is $145,839.12, plus interest.

9. Petitioner avers that in rejecting said claim for refund manifest error occurred and intervened to the prejudice of Petitioner who now assigns the following errors and each of them, which it avers occurred in the rejection of said claim for refund:

(a) The Commissioner erred in holding that Petitioner was not the taxpayer of any amount of tax in controversy.

(b) The Commissioner erred in failing to give consideration to, and the usual hearings on, Petitioner's claim.

(c) The Commissioner erred in holding that Petitioner failed to establish that it bore the burden of the tax, refund of which is claimed.

(d) The Commissioner erred in failing to hold that Petitioner established that it bore the burden of the tax, refund of which is claimed.

(e) The Commissioner erred in disallowing the refund of tax claimed.

(f) The Commissioner erred in failing to allow the refund of the tax claimed.

10. The facts upon which Petitioner relies as the basis of this proceeding are, as follows:

(a) All of the wheat processed by Petitioner during the period July 9, 1933, to January 6, 1936, both dates inclusive, was purchased for its account out of monies belonging to Petitioner by Niagara Falls Milling Company.

(b) All of the processing tax on wheat paid on account of the foregoing processing of wheat by Petitioner was paid for the account of Petitioner out of monies belonging to Petitioner by Niagara Falls Milling Company, or by it.

(c) Niagara Falls Milling Company and Middleport Flour Mills, Inc., now Angelus Milling Company, had common officers and a common bank account, where the monies belonging to each were commingled.

(d) Petitioner did not shift the burden of the processing tax on wheat in the selling price of the articles produced from the wheat involved in this proceeding, nor change the quantity of the wheat in any article, nor change the quality of any article in any manner whatsoever during the tax period, so that the tax was not recovered through inclusion thereof by Petitioner or any other person in the price of the articles produced from the wheat involved in this proceeding, nor did Petitioner shift the tax burden to the producer of wheat.

(e) Petitioner was not reimbursed on account of any part of the tax paid in the sum of $145,839.12.

(f) Petitioner was not relieved of the burden of the tax, nor did Petitioner shift such burden directly or indirectly in any manner whatsoever, including a shift or relief through the payment of rent, salaries, wages, advertising, but not limited thereto, nor was Petitioner relieved of the burden through cancellation of any mortgage, lease, contract, or otherwise, nor was the Petitioner relieved by reason of any extraordinary capital gains or through the sale of any article produced from any commodity other than wheat, nor was the Petitioner relieved by reason of any reduction in any excise tax or import duty, reduced by reason of the imposition of the processing tax on wheat, nor was there any understanding or agreement, written or oral, existing whereby Petitioner may be relieved of

the burden of such amount, be reimbursed therefor or may shift the burden thereof.

11. Petitioner desires that the hearing may be held in Washington, D. C.

WHEREFORE the Petitioner prays that this Board may hear the proceedings and that the Board may reverse the holding of the Commissioner, and order the refund of $145,839.12, together with interest thereon from the dates of payment thereof.

ANGELUS MILLING COMPANY,
R. A. O'CONNOR,
President.

State of New York
County of Niagara, SS:

R. A. O'CONNOR, being duly sworn, says that he is President of the Petitioner above named, that he has read the foregoing Petition and is familiar with the statements contained therein and that the facts set forth therein are true to the best of his information and belief.

R. A. O'CONNOR.

SUBSCRIBED and SWORN to before me this 18th day of August, 1941.

JOHN D. MAHONEY,
Notary Public.

EXHIBIT A-1

EXHIBIT A-1

Form 843
TREASURY DEPARTMENT
(Internal Revenue Service)
Revised June 1933

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

* The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date stamped)

[X] REFUND OF TAX ILLEGALLY COLLECTED.
[ ] REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
[ ] ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF New York
COUNTY OF Niagara } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps Niagara Falls Milling Co., Inc. and/or Middleport Flour Mills, Inc.

Business address 140 Market Street (Street) Lockport (City) New York (State)

Residence Branch office and factory at Middleport, New York

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 29th District of New York
2. Period (if for income tax, make separate form for each taxable year) from July 31, 1933, to Dec. 30, 1933
3. Character of assessment or tax Processing Tax
4. Amount of assessment, $ $7,675.46 Date of payment various - See Schedule Attached
5. Date stamps were purchased from the Government
6. Amount to be refunded $7,675.46 $7,675.46
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 16 of the Revenue Act of 1936, on August 26, 1938

The deponent verily believes that this claim should be allowed for the following reasons:

That the tax was illegally collected and in view of the United States Supreme Court's decision on the unconstitutionality of the A.A.A. that the exaction lacked the character of a true tax.

(Attach hereto other claims if space is not sufficient)

Sworn to and subscribed before me this

Signed

day of 193

(Signature of officer administering oath) (Title)

SEE INSTRUCTIONS ON REVERSE SIDE

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Claim No.

Character of assessment and period covered	Tax	Year	Month	Abstract No. or Page	Abstract No. or Line	Amount assessed	Date	Amount	Pg. Lb. Cr.
						$		$	

Payments Made to Collector of Internal Revenue at Buffalo, N. Y., for Taxes on Processing of Wheat

Niagara Falls Milling Co., Lockport, N. Y., from July 31, 1933 to December 30, 1933

July 31	$1,102.90
August 7	2,100.85
September 29	8,503.60
October 30	5,000.00
30	8,276.70
November 25	6,000.00
30	9,075.00
December 30	6,000.00
30	11,816.40
	$57,875.45

EXHIBIT A-2

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June 1930

CLAIM

A-2

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date received)

[x] REFUND OF TAX ILLEGALLY COLLECTED.

[ ] REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

[ ] ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF New York }
COUNTY OF Niagara } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps Niagara Falls Milling Co., Inc. and/or Middleport Flour Mills, Inc.

Business address 140 Market Street (Number) Middleport. (Street) New York (State)

Residence Branch office and factory at Middleport, N.Y.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 28th District of New York
2. Period (if for income tax, make separate form for each taxable year) from Jan. 29, 1936, to Dec. 31, 1936
3. Character of assessment or tax Processing Tax
4. Amount of assessment, $ 244,995.40; date of payment various - See Schedule attached
5. Date stamps were purchased from the Government
6. Amount to be refunded 244,995.40 $ 244,995.40
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 15 of the Revenue Act of 1936, on August 24, 1936.

The deponent verily believes that this claim should be allowed for the following reasons:

That the tax was illegally collected and in view of the United States Supreme Court's decision on the unconstitutionality of the A.A.A. that the exaction lacked the character of a true tax.

(Attach brief statement of facts if space is not sufficient)

Sworn to and subscribed before me this ____ day of ____, 193__.

Signed ____

(Signature of officer administering oath) (Title)

SEE INSTRUCTIONS ON REVERSE SIDE

PRINT IS BAD

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	Assessment Nos. on		Amount assessed	Paid, Abated, or Overcharge		Remarks
				Page	Line		Date	Amount	
						$		$	
					Total	$		Total	$

Claim No. ____ Claim No. ____

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Issue or Letter	Kind	Number	Denomination	Date of sale or issue	Amount	If spoiled or destroyed, return	
						Serial number	Period embracing
					$		

_____
Collector of Internal Revenue. (District)

Claim examined by—

Claim approved by—

Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed... $..... .....

Amount allowed... $..... .....

Amount rejected... $..... .....

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Wherever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Payments Made to Collector of Internal Revenue at Buffalo, N. Y., for Taxes on Processing of Wheat

Niagara Falls Milling Co., Lockport, N. Y., from January 29, 1934 to December 31, 1934

January 29	$6,000.00
29	11,682.30
March 2	6,000.00
2	14,058.40
31	5,000.00
31	18,440.60
April 30	4,000.00
30	2,000.00
30	16,728.00
May 31	4,000.00
June 1	13,077.60
30	16,861.20
30	3,583.60
July 30	17,000.00
30	3,925.70
August 30	16,000.00
30	4,522.60
September 29	11,000.00
29	10,116.60
October 31	15,000.00
31	6,571.40
November 30	13,000.00
30	8,426.20
December 31	11,000.00
31	6,901.20
	$244,895.40

EXHIBIT A-3

Exhibit A-3

Form 843
TREASURY DEPARTMENT
Internal Revenue Service
Revised June 1933

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date received)

[X] REFUND OF TAX ILLEGALLY COLLECTED.

[ ] REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

[ ] ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF New York
COUNTY OF Niagara } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps Niagara Falls Milling Co., Inc. and/or Middleport Flour Mills, Inc

Business address 140 Market Street (Street) Lockport (City) New York (State)

Residence Branch office and factory at Middleport, N.Y.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 23th District of New York
2. Period (*if for* income tax, make separate form for each taxable year) from January 30, 19 36, to Dec. 12, 19 36
3. Character of assessment or tax Processing Tax
4. Amount of assessment, $ 131,274.42; date of payment various - See Schedule Attached
5. Date stamps were purchased from the Government
6. Amount to be refunded $131,274.42
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 15 of the Revenue Act of 19 36, on August 24, 19 36

The deponent verily believes that this claim should be allowed for the following reasons:

That the tax was illegally collected and in view of the United States Supreme Court's decision on the unconstitutionality of the A.A.A. that the exaction lacked the character of a true tax.

(Affiant's home address if agent is not employee)

Sworn to and subscribed before me this ____ day of ____, 193__

Signed ____

(Signature of officer administering oath) (Title)

SEE INSTRUCTIONS ON REVERSE SIDE

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period covered	List	Year	Month	Assessed No. on Page	Assessed No. on Line	Amount assessed	Paid, Amount, or Unassessed Date	Paid, Amount, or Unassessed Amount	Rec'd
						$		$	
					Total,	$		Total,	$

Claim No. _____ Claim No. _____

I certify that the records of this office show the following facts as to the purchase of stamps:

No. Where Sold or Issued	Class	Number	Denomination	Date of sale or issue	Amount	If spoiled or unused, stamps: Serial number	Period embraced
					$		

_____
Collector of Internal Revenue. (District)

Claim examined by —

Claim approved by —

Chief of Division

COMMITTEE ON CLAIMS

Amount claimed... $ _____

Amount allowed... $ _____

Amount rejected... $ _____

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be attached to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If no executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

[illegible]

Payments Made to Collector of Internal Revenue at Buffalo, N. Y., for Taxes on Processing of Wheat

Niagara Falls Milling Co., Lockport, N. Y., from January 30, 1935 to December 12, 1935

January 30	$9,000.00
30	12,245.40
March 4	12,000.00
1	3,931.49
30	10,000.00
30	4,000.00
May 3	10,000.00
3	3,433.60
31	3,884.40
31	3,985.50
31	7,066.80
June 30	10,765.20
July 15	3,000.00
August 20	3,060.00
September 30	4,596.45
30	2,707.73
30	3,016.80
October 30	4,926.98
November 2	7,750.20
30	8,713.27
December 12	3,250.60
	$131,274.42

EXHIBIT "B"

P. T. Form 70
TREASURY DEPARTMENT
Internal Revenue Service

READ AND FOLLOW INSTRUCTIONS CAREFULLY

File claim on or before June 30, 1937, with collector of internal revenue. If not received after that date, not to be allowed later than July 30, 1937.

CLAIM FOR REFUND
(Under Title VII, Revenue Act of 1936)
OF
PROCESSING TAX
PAID UNDER THE PROVISIONS OF
THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

DATE RECEIVED BY COLLECTOR (STAMP BELOW)

EXHIBIT B

Name of claimant NIAGARA FALLS KNITTING COMPANY
(Type or print name and address)
Address 150 MARKET STREET
(Number and street or route)
LOCKPORT, NEW YORK
(City or town) (State)

(1) Name of commodity (processed from such commodity)	(2) Amount of burden of processing tax borne by claimant and not shifted (as explained in Schedule D)	(3) Amount of processing tax refund on last unconditionally repaid sale (Itemized in Schedule E)	(4) Amount of refund claimed (Sum of columns 2 and 3)	(5) For use of Bureau
	Dollars / Cents	Dollars / Cents	Dollars / Cents	
Hybrid	436,231 73		436,231 73	

I swear (or affirm) with respect to this claim and the schedules and other evidence submitted as a part thereof:
1. That the amount and date of each payment of processing tax on the processing of the commodity named above as shown in Schedule A are true and correct;
2. That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to claimant as shown in Schedule B, are the total amounts of such refunds and credits;
3. That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to other persons as shown in Schedule C, are the total amounts of such refunds and credits of which claimant has any knowledge;
4. (a) That the amount of the burden of the processing tax on the processing of the commodity named above which was borne by the claimant as set forth in column 2 above is true and correct; that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article processed from such commodity; (2) through reduction of the price paid for such commodity; or (3) in any manner whatsoever, and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; and (b) that the data and statements submitted in and made a part of Schedule D are true and correct;
5. That the amounts of processing tax shown in column 3 and Schedule E as having been passed on and repaid were unconditionally repaid to vendees, each of whom has furnished evidence which is attached showing that he has borne the burden thereof, has not been relieved thereof, nor reimbursed therefor, and has not shifted such burden, directly or indirectly, and is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever;
6. That no other claim has been filed by claimant on P. T. Form 70 for refund of any part of the amount of this claim;
7. That the claimant is entitled to and demands payment of this claim in the amount shown above.

Subscribed and sworn to before me this ..... (Name of claimant)

[NOTARIAL SEAL] ..... day of ....., 193... .....
(Signature of person swearing affidavit)

(Signature of other witnessing oath) (Title) (Where attested to by officer, give title. If member of firm, or if officer of corporation or duly authorized manager or agent, give title)

Section 35, United States Criminal Code, as amended, provides a fine of $10,000 or 10 years imprisonment, or both, for the filing of a false claim, for making of a false statement in an affidavit, or for falsifying, concealing, or covering up by any trick, scheme, or device, a material fact in connection with a claim.

Claimed, $ ..... Examined by .....

Allowed, $ ..... Approved ..... (Chief of division)

Rejected, $ ..... , 19...

[1] The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee. Any claim for refund of amounts paid as tax on the processing of that quantity of a commodity which was processed for a customer for a charge or fee shall be filed on P. T. Form 70.

[2] See par. 3 of instructions.

*Filed with Collector of Revenue[2], Buffalo, N. Y., [illegible]

SCHEDULE A.—PROCESSING TAX PAYMENTS BY CLAIMANT TO COLLECTOR OF INTERNAL REVENUE

Item No.	Month and year for which tax was paid	Amount of payment for item 1 (column 2) for which claim is filed (see instruction 9)	Amount of each payment made on account of the total payments of column 3 for the month	Penalty	Interest	Date of each payment	District in which paid	FOR COLLECTOR'S USE—CERTIFICATE: Date	Amount	Volume: List	Volume: Page	Volume: L.
		Annual				1933						
1.	July	15,604.85	2100.85			aug 2	Buffalo					
			13503.60			Sept 29						
			500.00			Oct 30						
			15,604.85									
2.	Aug	19,276.20	9,276.20			Oct 31						
			4,000.00			Nov 25						
			13,276.20									
3.	Sept	15,025.00	9025.00			Nov 30						
			6000.00			Dec 2						
			15,025.00									
4.	Oct	17,816.40	11,816.40			Dec 30						
			6000.00			1934 Jan 29						
			17,816.40									
5.	Nov	17,682.30	14,682.30			Jan 29						
			3,000.00			Mar 2						
			17,682.30									
6.	Dec	19,057.40	16,057.40			Mar 2						
			3,000.00			Mar 31						
			19,057.40									
7.	Jan	22,440.06	13,440.06			Mar 31						
			9,000.00			Apr 28						
			22,440.06									
8.	Feb	22,738.00	2,000.00			Apr 30						
			16,738.00			30						
			4,000.00			May 1						
			22,738.00									
9.	Mar	13,077.66	1,330.72			June 1						
10.	Apr	16,341.32	13,761.32			30						
11.	May	24,573.60	3,573.60			30						
			12,000.00			July 30						
			20,573.60									
12.	June	19,925.72	3,925.72			July 30						
			16,000.00			Aug 30						
			19,925.72									

[1] See par. 9 (b) of instructions.

[2] Enter each of several payments for the same month on successive lines; and show the total of all such payments for a single month immediately below the entry of the amount of the last of such payments.

SCHEDULE B.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

Item number of claim (Schedule A)	Claims				Refunds		Total refunds and credits	Per cent of Item
	Form No.	Month	Year	Amount	Date received	Amount		
				$		$	$	

SCHEDULE C.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

Item number of claim (Schedule A)	Name and address of each person to whom tax was refunded, or by whom credit was taken	Claims				Refunds		Per cent of Item
		Form No.	Month	Year	Amount	Date received	Amount	
					$		$	

SCHEDULE D—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN

(a) AVERAGE MARGIN FOR THE TAX PERIOD

(Claimant must show as to each month of the tax period the data required in columns 2 to 7, inclusive. Such data shall be shown only with respect to that quantity of the commodity as to which the claimant paid processing tax to the collector of internal revenue. See also para. 7 (a), (f) and 9 (c) also 7 (b) (4) of instructions on this form.)

(1) Month (or portion thereof, such period and year)	(2) Gross sales value of all articles processed from the commodity	(3) Cost of the commodity processed during month	(4) Amount of tax paid on account of such commodity (Col. 3 x rate)	(5) Total of columns 3 and 4	(6) Margin (Amount in column 2 less amount in column 5)	(7) Total number of units of the commodity processed during month	(8) Per cent of Business
m3	Jan. Carryover	Schedule D-2					
July	79134.96	32396.53	15699.97	48096.49	31038.47	52019	
Aug	79072.40	30163.05	14376.76	44539.76	34532.64	47659	
Sept	73231.60	25269.30	12496.00	40399.32	32832.28	50250	
Oct	73036.55	35661.13	17516.49	53361.57	19674.98	59258	
Nov	142752.32	46839.59	19682.36	66520.19	76232.13	58991	
Dec	101838.00	62123.92	19055.96	81190.52	20647.48	69528	
1934 Jan.	96509.89	59976.39	22940.06	82916.45	13593.44	74800	
Feb	100596.00	59009.61	22925.09	81934.61	18661.39	45760	
March	29441.96	58329.69	13097.60	71427.29	(41985.33)	43692	
April	101702.14	60102.49	16861.20	76963.69	24738.45	56209	
May	113013.09	58376.98	20583.60	78960.58	34052.51	68612	
June	106704.00	59616.18	19328.70	78944.88	27759.12	66419	
July	50989.02	59599.96	15682.00	73508.50	17480.52	51992	
Aug	84459.24	92410.76	25116.60	117527.36	(33,068.12)	53702	
Sept	94166.02	52241.28	19571.90	101813.28	(7647.26)	65338	
Oct	111,113.52	75509.74	19436.24	104945.98	6167.54	64769	
Nov	103396.08	59458.33	17891.20	95153.53	33941.55	57008	
Dec	115303.02	68951.71	24345.80	113205.11	2097.91	80814	
1935 Jan	99124.00	66216.30	17931.49	89147.99	9976.31	59791	
Feb	71396.48	65986.29	19933.60	85319.89	(11923.39)	58112	
March	26936.68	66255.96	11052.32	77308.28	(38451.54)	36841	
April	63926.48	60506.74	16762.80	77269.54	(13343.06)	55896	
May	83952.56	56824.20	13385.80	75210.65	8741.91	61256	
June	54352.48	66176.91	10830.96	77007.87	(23655.39)	36103	
July	66263.66	44366.66	12009.20	56433.86	9829.80	40224	
Aug	106639.74	109994.92	19707.92	129702.84	(23062.10)	65943	
Sept	161312.36	123196.93	31000.80	154197.73	7114.72	103,336	
Oct	147944.80	115921.99	29822.87	145734.86	2210.94	116,196	
Nov.	116482.88	123669.35	24873.96	148246.95	(31764.59)	81,913	
Dec. 1935	95419.82	125097.96	20135.70	145113.66	9693.23	67019	
Jan 1936	20951.55	19091.61	2996.85	22087.46	1135.91	9319	
	2,513,235.19	2,048,516.24	513,949.96	2,562,466.20	- 141,965.52	1,704,641	

The average margin[1] for the tax period per ____ (Unit of the commodity) was $ 1.5034

[1] The average margin for the tax period shall be ascertained by dividing the total of the margins for the period (total of column 6) by the total number of units of the commodity processed during the period (total of column 7).

[2] The term "unit of commodity" is defined in par. 9 (f) of instructions.

(4)

No. 2

Schedule A—Processing Tax Payment by Claimant to Collector of Internal Revenue

1934				1934
13 July	15,522.60	4,522.60	Aug.	30
		11,000.00	Sept.	29
		15,522.60		
14 Aug.	25,116.60	10,116.60	Sept.	29
		15,000.00	Oct.	31
		25,116.60		
15. Sept.	19,571.40	6,571.40	Oct.	31
		13,000.00	Nov.	30
		19,571.40		
16 Oct.	19,426.20	8,426.20	Nov.	30
		11,000.00	Dec.	31
		19,426.20		
17 Nov.	15,901.20	6,901.20	Dec.	31
			1935	
		9,000.00	Jan.	30
		15,901.20		
18 Dec.	24,245.40	12,245.40	Jan.	30
		12,000.00	Mar.	4
		24,245.40		
1935				
19 Jan.	17,931.44	3,931.44	Mar.	1
		10,000.00		30
		4,000.00		30
		17,931.44		
20 Feb.	17,433.60	10,000.00	May	3
		3,433.60		3
		3,884.40		31
		17,433.60		

21 Mar.	11,052.30	7,066.80		31
		3,985.50		31
		11,052.30		
22 Apr.	16,762.80	10,765.20	June	30
		3,000.00	July	15
		13,765.20		
No. 3				
23 May	18,385.80	3,000.00	Aug.	20
		4,596.45	Sept.	30
		7,596.45		
24 June	10,830.90	2,707.73		30
25 July	12,067.20	3,016.80		30
26 Aug.	19,707.92	4,926.98	Oct.	30
27 Sept.	31,000.80	7,750.20	Nov.	12
		3,250.60	Dec.	12
		11,000.80		
28 Oct.	34,852.87	8,713.27	Nov.	30
29 Nov.	24,573.90	3,173.90	Dec.	31
30 Dec.	20,105.70			
		436,231.73		

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS—Con.

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(3) AVERAGE MARGIN FOR THE PERIOD BEFORE AND AFTER THE TAX

(Claimant must show as to each month of the period before and after the tax the data required in columns 2 to 6, inclusive. See also para. 7 (3) (f) and 9 (1) also 7 (3) (j) of instructions on this form)

(1) Month (Or portion thereof, state periods and year)	(2) Gross sales value of all articles produced from commodity	(3) Cost of commodity processed during month	(4) Margin (Amount in column 2 less amount in column 3)	(5) Total number of units of the commodity processed during month	(6) Tax rate of Burden
1933	Schedule D-2				
July	$ 59595.64	$ 31239.22	$ 28369.90	66205	
Aug	59910.14	34326.22	25583.92	56999	
Sept	42113.10	24659.09	17454.01	42195	
Oct	59269.20	29360.99	29909.21	52930	
Nov	46852.24	27520.51	19331.73	48116	
Dec	46759.23	28821.96	17937.27	44832	
1934					
Jan	49651.98	30969.08	18682.62	46611	
Feb	54409.95	33623.22	20786.73	51319	
March	24119.80	16520.30	7599.50	24117	
April	61805.04	35624.94	26180.30	63038	
May	53119.38	32005.54	21113.84	51898	
June	59710.94	34936.95	24994.35	63454	
July	46389.66	24165.19	22224.47	49938	
Aug	40919.26	29814.36	11105.81	40918	
Sept	63403.20	30941.95	32561.25	69441	
Oct	65250.45	38489.93	26762.93	72326	
Nov	55904.16	34929.06	21125.10	63039	
Dec	59924.60	33583.35	26341.65	65412	
1935					
Jan	53137.93	29826.61	23311.31	59918	
Feb	57270.00	23284.50	33985.20	63280	
March	16816.50	15055.36	1761.14	69581	
April	39960.04	34324.54	39635.50	65698	
May	74384.44	46196.92	28207.91	64901	
June	86112.00	51690.88	34421.12	66290	
1936					
February	118869.32	117242.35	1626.97	166253	
March	116291.78	115585.29	706.51	105292	
April	94604.34	91922.92	2681.38	88092	
May	88089.16	74919.29	13169.99	66810	
June	96441.46	89933.61	6552.45	79850	
July	118395.20	109900.65	8584.55	88981	
Totals	1,967,669.22	1,351,126.16	616,543.06	1,881,299	

The average margin [1] for the period before and after the tax per Pound (Unit of measurement) was $ .32477

[1] The average margin for the period before and after the tax shall be ascertained by dividing the total of the margins for the period (total of column 4) by the total number of units of the commodity processed during the period (total of column 5).

[2] The term "unit of commodity" is defined in par. 9 (f) of instructions.

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS—Con.

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(c) CALCULATION OF AMOUNT AS INDICATED BY THE EVIDENCE AS TO MARGINS

(1) Average margin per unit of commodity processed on the portion hereof on which the tax (As shown by Schedule D-1-(b))	(2) Average margin per unit of commodity processed for the tax (As shown by Schedule D-1-(a))	(3) Amount by which average margin for the period shown and upon the tax exceeds the average margin for the tax period (Column 1 minus column 2)	(4) Total number of units of commodity processed during the period with respect to which processing tax was paid (As shown by Schedule D-1-(a))	(5) Amount of the burden borne by claimant and not shifted to others (Column 3 multiplied by column 4)
a .3277 per Bu. (Unit of commodity)	$ .2744 per Bu. (Unit of commodity)	$ .2533 per Bu. (Unit of commodity)	54,7040 Bu. (Unit of commodity)	$ 155,633.06

(Claimant must approve either A or B below and strike out the one not applicable)

Balance Carried Forward and Paid — 132,777.96
Balance 22,855.10

A. The amount shown in column 5 above, namely, $ _____, is the correct amount of the processing tax paid by claimant and not shifted to others. (If claimant agrees that this figure is correct any additional facts and evidence in support thereof should be set out and made a part of Schedule D-2.)

B. The amount shown in column 5 above is not the correct amount of the processing tax paid by claimant and not shifted to others. The correct amount is $ 43.6,2 31.27 for the reasons and upon the evidence set out and made a part of Schedule D-2.

D-2. OTHER EVIDENCE

(Claimant shall list below each document, exhibit, statement of facts, and other evidence submitted with and made a part of this schedule in support of the showing as to margins, or in rebuttal thereof and tending to establish that he bore the burden of the tax. See also para. 7 (a) and 7 (d) of instructions.)

The gross Sales value of Wheat processed as shown in Schedule D a and D-1 is the averare cost price. Actual sale prices were substantially lower than cost prices to such an extent that the actual sales value realized was much lower than that shown.

It has not been possible to complete the compilation of sales data necessary to show actual sales value, price to due date on this claim, the claimant is proceeding to complete this data and believes it will show an actual sales value so much less than that average cost price as to demonstrate that none of the processing taxes paid were passed on to vendees.

SCHEDULE B.—PROCESSING TAX UNCONSTITUTIONALLY REPAID TO CLAIMANT'S VENDEES
(The total amount repaid as shown by this schedule should be entered in column 2 on face of the claim)

Item no. (person's name as entered under item 1 on face of claim)	Persons to Whom Processing Tax Was Unconstitutionally Repaid, and Who Have not Repaid or Been Tax Credited, or required to promptly File a Refund Claim			
	Name	Address	Date of the payment	Amount
				$

INSTRUCTIONS
(See also Chapters II and VI of Regulations 92)

1. The law.—Title VII of the Revenue Act of 1936 provides, in part, as follows:

(a) That the burden of proof in any proceeding instituted in the Court of Claims or in the district courts of the United States for the recovery of any amount paid by the claimant as a tax under the Agricultural Adjustment Act, as amended, shall be upon the claimant if (1) the claimant has not filed a claim for refund of such amount prior to the date of the enactment of this Act [August 24, 1936], in accordance with the regulations prescribed by the Commissioner of Internal Revenue, or (2) the claimant has not paid such amount to the vendee of a manufacturer or producer with whom the claimant has entered into an agreement specifically providing for the payment by the claimant of such amount to such vendee;

(b) That no refund shall be made of such amount and less not been refunded directly or indirectly to the claimant or the vendee of such manufacturer or producer, (1) through the inclusion of such amount in the price of the articles with respect to which such amount was imposed, or of any other articles processed from such articles, or (2) through the shifting of such amount to the vendee of such manufacturer or producer, or (3) through the absorption of such amount by such vendee, or (4) through reimbursement to such vendee by any other person in the business relationship between such vendee and the claimant, or (5) through the application of such amount against the amount payable by such vendee to such manufacturer or producer pursuant to such agreement, or (6) otherwise, unless the claimant establishes to the satisfaction of the Commissioner that the loss to the claimant resulting from the imposition of such amount was not reduced through any of the circumstances described in clauses (1) to (6), inclusive, of this subsection;

(c) That no refund shall be made of such amount to any vendee (1) who have the burden of proof in any proceeding instituted in the Court of Claims or in the district courts of the United States for the recovery of any amount paid by the claimant as a tax under the Agricultural Adjustment Act, as amended, shall be upon the claimant if (1) the claimant has not filed a claim for refund of such amount prior to the date of the enactment of this Act [August 24, 1936], in accordance with the regulations prescribed by the Commissioner of Internal Revenue, or (2) the claimant has not paid such amount to the vendee of a manufacturer or producer with whom the claimant has entered into an agreement specifically providing for the payment by the claimant of such amount to such vendee;

(b) That no refund shall be made of such amount if and to the extent that it is established that the burden of such amount has been borne by any other person, or has

...

...

...

EXHIBIT "C"

AMENDMENT TO CLAIM

CLAIM FOR REFUND

(Under Title VII, Revenue Act of 1936)

OF

PROCESSING TAX[1]

PAID UNDER THE PROVISIONS OF

THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

EXHIBIT "C"

Name of claimant ANGLO MILLING COMPANY

(Type or print name and address)

Address 702 TRUST CO., BUILDING

NIAGARA FALLS, NEW YORK

(a) Name, residence[2] (number and street, city, state, customs district, or other post office) of vendor	(b) Amount of burden of processing tax borne by the claimant and not shifted as set forth in Schedule B	(c) Amount of burden of processing tax borne by claimant and not shifted as set forth in Schedule B	(d) Amount of refund claimed (Item 2 of Schedule A)	(e)
	Dollars / Cents	Dollars / Cents	Dollars / Cents	
Total	145,830 12		145,830 12	

I swear (or affirm) with respect to this claim and the schedules and other evidence submitted as a part thereof:

1. That the amount and date of each payment of processing tax on the processing of the commodity named above as shown in Schedule A are true and correct;
2. That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to claimant as shown in Schedule B, are the total amounts of such refunds and credits;
3. That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to other persons as shown in Schedule C, are the total amounts of such refunds and credits of which claimant has any knowledge;
4. (*) That the amount of the burden of the processing tax on the processing of the commodity named above which was borne by the claimant as set forth in column 2 above is true and correct; that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article processed from such commodity; (2) through reduction of the price paid for such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; and (5) that the data and statements submitted in and made a part of Schedule D are true and correct;
5. That the amounts of processing tax shown in column 3 and Schedule E as having been passed on and repaid were unconditionally repaid to vendees, each of whom has furnished evidence which is attached showing that he has borne the burden thereof, has not been relieved thereof, nor reimbursed therefor, and has not shifted such burden, directly or indirectly, and is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever;
6. That no other claim has been filed by claimant on P. T. Form 79 for refund of any part of the amount of this claim;
7. That the claimant is entitled to and demands payment of this claim in the amount shown above.

Subscribed and sworn to before me this

[NOTARIAL SEAL] 15th day of August 1938

Emily T. Miller Notary

(Signature and official capacity)

(Title)

Anglo Milling Company

(Name of claimant)

Harry M. Richings

(Signature of person executing claim)

President

(State whether individual owner, member of firm, or officer of corporation or duly authorized manager or agent, give title)

Section 35, United States Criminal Code, as amended, provides a fine of $10,000 or 10 years imprisonment, or both, for the filing of a false claim, for making of a false statement in an affidavit, or for falsifying, concealing, or covering up by any trick, scheme, or device, a material fact in connection with a claim.

Claimed, $ —

Allowed, $ —

Rejected, $ —

Examined by —

Approved —

(Head of division)

—, 19—

[1] The term "processing tax" means any tax or exaction characterized a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee. Any claim for refund of amounts paid as tax on the processing of that quantity of a commodity which was processed for a customer for a charge or fee shall be filed on P. T. Form 72.

[2] See par. 3 of instructions.

25 1/2

SCHEDULE A.—PROCESSING TAX PAYMENTS BY CLAIMANT TO COLLECTOR OF INTERNAL REVENUE.

Item No.	Month and year for which tax was paid	Amount of payment for basic unit on which tax was paid, and rate of tax per unit	Amount of such payment on which tax was paid, and rate of tax per unit	Penalty	Interest	Date of such payment	Stamps to which affixed	FOR COLLECTOR'S USE—CERTIFICATE (Collector)				
								Paid		Accepted		
								Amount	Date	List	Page	L.
	Mo.	$	$	$	$			$				

Allocation of Refund Due Niagara Falls Milling Company and Middleport Flour Mills Inc.
(Now Angelus Milling Co., Inc.)

Schedule A

Period	Sales of Flour N. F. Milling Co.		Sales of Flour Angelus Milling Co.		Total Sales		Percentage Applicable to Angelus Milling Co.	Refund Due Angelus Milling
	Value	Barrels	Value	Barrels	Value	Barrels		
July 1 to Dec. 31, 1933	$337,383.26	53,981	$165,563.99	26,490	$502,947.25	80,471	32.9	$19,041.02
Year 1934	920,537.20	147,286	499,535.63	79,927	1,420,072.83	227,213	35.2	84,133.91
Year 1935	1,062,586.14	170,000	510,555.46	81,688	1,573,141.60	251,688	32.5	42,664.19
	$2,320,506.60	371,267	$1,175,655.08	188,105	$3,496,161.68	559,372	33.6	$145,839.12

Period	Processing Taxes Paid	N. F. Milling Co.	Angelus Milling Co.
July 1, to Dec. 31, 1938	$57,875.45	$38,834.43	$19,041.02
Year 1934	244,895.40	160,761.49	84,133.91
Year 1935	131,274.42	88,610.23	42,664.19
	$434,045.27	$288,206.15	$145,839.12

State of New York
County of Niagara, SS:

The within claim for refund was originally filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc. The name of Middleport Flour Mills Inc. was changed by permission of the Secretary of State at Albany, N. Y. to Middleport Flour Mills Inc. Originally the claim in the name of both Companies was for the sum of $434,045.27.

The amount to be allocated to the Angelus Milling Company is $145,839.12 and the amount to be allocated to the Niagara Falls Milling Company is $288,206.15.

Since the filing of said claim, the Niagara Falls Milling Company was adjudicated a bankrupt on the 21st day of March, 1938. Since said date the claim of the Niagara Falls Milling Company, Inc. and the Angelus Milling Company, Inc. was handled by the same personnel, both companies having had the same officers and approximately the same directors The Angelus Milling Company, Inc. at the present time is not bankrupt and this amended claim is presented solely on behalf of the Angelus Milling Company, Inc. and request is hereby made that the amount of refund due the Angelus Milling Company, Inc. be determined and paid to it as a separate entity and that said claim be not commingled with the claim of the Niagara Falls Milling Company. The within claim has been prepared from certain records of the two companies and is based on data as shown by the attached Schedule A.

ANGELUS MILLING COMPANY, INC.,

By _____,
President

Subscribed and sworn to before me this —— day of August, 1938.

_____
Notary Public

SCHEDULE B.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

Item number (check mark (✓) if credit or refund of entire item made), by item number, in Schedule A	Claims				Refunds		Total refunds and credits	Per use of Bureau
	Taken on U. S. return			Amount	Date received	Amount		
	Form No.	Month	Year					
				$		$	$	

SCHEDULE C.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

Item number (check mark (✓) if credit or refund of entire item made), by item number in Schedule A	Name and address of each person to whom tax was refunded, or by whom credit was taken	Claims				Refunds		Per use of Bureau
		Taken on U. S. return			Amount	Date received	Amount	
		Form No.	Month	Year				
					$		$	

(B)

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN

(a). AVERAGE MARGIN FOR THE TAX PERIOD

(Claimant must show as to each month of the tax period the data required in columns 2 to 7, inclusive. Such data shall be shown only with respect to that quantity of the commodity as to which the claimant paid processing tax to the collector of internal revenue. See also para. 7 (a) (f), and 9 (a) also 7 (b) (4) of instructions on this form.) 29

(1) Month (Or portion thereof) with respect to which data are given	(2) Gross sale value of all articles processed from the commodity	(3) Cost of the commodity processed during month	(4) Amount of tax paid on processing of such commodity	(5) Total of columns 3 and 4	(6) Inclusive (Adjustment to columns 3 but entered in column 5)	(7) Total number of units of the commodity processed during month	(8) Per unit of Measure.
1935.							
	$	$	$	$	$		

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS—Con.

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(b) AVERAGE MARGIN FOR THE PERIOD BEFORE AND AFTER THE TAX

(Claimant must show as to each month of the period before and after the tax the data required in columns 2 to 6, inclusive. See also para. 7 (i) (2) and 9 (c) also 7 (j) (4) of instructions on this form)

(1) Month (Or portion thereof) during period and year	(2) Gross sales value of all articles processed from commodity	(3) Cost of commodity processed during month	(4) Margin (4 minus 3) (Amount in column 2 less amount in column 3)	(5) Total number of units of the commodity processed during month	(6) Per unit of Bureau
193...					
	$	$	$		

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS—Con.

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(c) CALCULATION OF AMOUNT AS INDICATED BY THE EVIDENCE AS TO MARGINS

(1)	(2)	(3)	(4)	(5)
Average margin per unit of commodity processed by the period before and after the tax (As shown by Schedule D-1-(b))	Average margin per unit of commodity processed for the tax period (As shown by Schedule D-1-(a))	Amount by which average margin for the period before and after the tax exceeds the average margin for the tax period (Column 1 minus column 2)	Total number of units of commodity processed during tax period with respect to which processing tax was paid (As shown by Schedule D-1-(a))	Amount of tax burden borne by claimant and not shifted to others as indicated by margin evidence (Column 3 multiplied by column 4)
$..... per ..... (Unit of commodity)	$..... per ..... (Unit of commodity)	$..... per ..... (Unit of commodity)	..... (Unit of commodity)	$ .....

(Claimant must complete either A or B below and strike out the one not applicable)

A. The amount shown in column 5 above, namely, $..... is the correct amount of the processing tax paid by claimant and not shifted to others. (If claimant agrees that this figure is correct any additional facts and evidence in support thereof should be set out and made a part of Schedule D-2.)

B. The amount shown in column 5 above is not the correct amount of the processing tax paid by claimant and not shifted to others. The correct amount is $....., for the reasons and upon the evidence set out and made a part of Schedule D-2.

D-2. OTHER EVIDENCE

(Claimant shall list below each document, exhibit, statement of facts, and other evidence submitted with and made a part of this schedule in support of the showing as to margins, or in rebuttal thereof and tending to establish that he bore the burden of the tax. See also para. 7 (a) and 7 (c) of instructions.)

SCHEDULE E—PROCESSING TAX UNCONDITIONALLY REPAID TO CLAIMANT'S VENDEES

(The total amount repaid as shown by this schedule should be entered in column 3 on face of the claim)

Show the payment to which each repayment relates, by item number in Schedule A	Vendees to Whom Processing Tax Was Unconditionally Repaid, and Who Bore the Burden of Such Tax (If unknown, as required in paragraph 9 (b) of Instructions, so indicated herein)			
	Name	Address	Date of re payment	Amount
				$

INSTRUCTIONS

(See also Chapters III and VI of Regulations 96)

1. The law.—Title VII of the Revenue Act of 1936 provides, in part, as follows:

[illegible]

(f)

PRINT IS BAD

INSTRUCTIONS—Continued

EXHIBIT "D"

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal
Revenue

May 23, 1941.

Angelus Milling Company,
702 Trust Company Building,
Niagara Falls, New York.

In re: Claim No. F-10130
Amount: $145,839.12

Sirs:

Reference is made to the above-mentioned claim for refund of tax stated to have been paid under the provisions of the Agricultural Adjustment Act.

The benefits of Title VII of the Revenue Act of 1936 extend only to the taxpayer or to persons who have acquired the rights of the taxpayer by some assignment effected by operation of law. Since the amount for which refund is claimed was not paid to the Government as tax by you, there is no authority in law whereby your claim may be considered.

Furthermore, your claim does not contain margins computed in accordance with section 907 of the Revenue Act of 1936 and Article 605 of Regulations 96, nor has any other evidence been submitted establishing that you bore the burden of the tax as required by section 902 of the Act and Article 609 of Regulations 96. Hence, you have not filed a true and complete claim in accordance with the requirements of section 903 of the Act and the regulations promulgated pursuant thereto.

Since you did not pay the tax, refund of which is claimed, to the Government and you have not filed a true and complete claim in accordance with the requirements of Title VII of the Revenue Act of 1936, your claim is hereby disallowed in full.

The disallowance of your claim will become final upon the expiration of three months after the date of the mailing of this letter, unless within such period you have filed a petition

with the United States Processing Tax Board of Review, Munsey Building, Washington, D. C., for a hearing on the merits of the claim.

Respectfully,

GUY T. HELVERING,
Commissioner,

By _____,
Acting Deputy Commissioner.

FILED
12:15 P. M.
Oct. 4, 1941
United States Processing
Tax Board of Review
R

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 398

MOTION FOR BETTER STATEMENT OF CLAIM

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves that an order be entered pursuant to Rule 14 of the Rules of Practice before the United States Processing Tax Board of Review (Second Edition) requiring the petitioner in the above-entitled proceeding to make a further and better statement of the nature of its purported claim for refund by setting forth in detail an explanation of the following apparent inconsistencies, contradictions, and ambiguities appearing in the petition and its accompanying exhibits in the following particulars, to wit:

The pertinent paragraphs in question of the petition herein are as follows:

> "2. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner was a processor of, and processed, wheat under the name of Middleport Flour Mills, Inc., now Angelus Milling Company.
>
> "3. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner paid, or had paid for its account out of its own monies, to the Collector of Internal Revenue, Buffalo, New York, processing taxes on wheat,

on account of processings of wheat by it, in the sum of $145,839.12.

"On or about January 29, 1936, claims were filed on Form 843 by Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc., for the refund of processing taxes on wheat in the total sum of $454,045.27 (EXHIBITS A-1, 2 and 3 attached) paid on account of the processing of wheat by them.

"5. After the passage of the Revenue Act of 1936, and prior to January 1, 1940, Niagara Falls Milling Company filed a claim for the refund of processing tax in the sum of $436,231.73, with the Collector of Internal Revenue at Buffalo, New York, paid on account of the processing of wheat by it and by Angelus Milling Company, formerly Middleport Flour Mills, Inc. (EXHIBIT B attached)

"6. After the passage of the Revenue Act of 1936, and prior to January 1, 1940, i. e. on or about August 15, 1938, Angelus Milling Company filed a claim for the refund of $145,839.12, paid by it, or for its account out of its monies, on account of the processing of wheat by it, with the Collector at Buffalo, New York, designating this claim as 'Amendment to Claim.' (EXHIBIT C attached)

* * * * *

"10. The facts upon which petitioner relies as the basis of this proceeding are, as follows:

"(a) All of the wheat processed by Petitioner during the period July 9, 1933, to January 6, 1936, both dates inclusive, was purchased for its account out of monies belonging to Petitioner by Niagara Falls Milling Company.

"(b) All of the processing tax on wheat paid on account of the foregoing processing of wheat by Petitioner was paid for the account of Petitioner out of monies belonging to Petitioner by Niagara Falls Milling Company, or by it.

"(c) Niagara Falls Milling Company and Middleport Flour Mills, Inc., now Angelus Milling Company, had common officers and a common bank account, where the monies belonging to each were commingled."

The respondent respectfully submits in support of the foregoing motion that a reading of the above-quoted paragraphs of the petition readily discloses that the said petition is so

replete with inconsistencies, contradictions, and ambiguities as to fail wholly to advise this respondent definitely as to the true identity of either the processor or the taxpayer with respect to the alleged payments of amounts as tax on the processing of wheat in the total alleged sum of $145,839.12. For example, while it is alleged in paragraph 2 of the petition that the petitioner during the tax period in question processed wheat under the name of "Middleport Flour Mills, Inc., now Angelus Milling Company", the petitioner further alleges in paragraph 3 of the petition that the processing taxes in question were paid either by the petitioner *Angelus Milling Company*, itself, or for its account out of its own moneys. It also is alleged in paragraphs 4 and 5 of the petition that other claims were filed theretofore, both by "Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc." and "Niagara Falls Milling Company" for refund of amounts paid as tax on the processing of wheat, which claims purportedly included the amount attempted to be claimed by the petitioner in the instant proceeding. However, the petitioner has failed to allege and show how and when, if at all, the petitioner acquired the properties of Middleport Flour Mills, Inc., and in particular the right to file a claim for refund of processing taxes apparently paid either by and in the name of the alleged processor, Middleport Flour Mills, Inc., or by Niagara Falls Milling Company out of moneys belonging either to Middleport Flour Mills, Inc., or to the petitioner (see paragraphs 2 and 10(b) of petition); nor does the petitioner allege and show whether or not Middleport Flour Mills, Inc., is a trade name of an individual, a partnership, or a corporation. The respondent further submits that the allegations hereinabove quoted in paragraphs 10(a), (b), and (c) of the petition herein, with respect to the alleged manner of wheat purchases and the alleged payments as tax on the processing thereof, and other allegations with reference to the alleged common officers and common bank account of the various concerns therein mentioned, to wit, Niagara Falls Milling Company, Middleport Flour Mills, Inc., and the petitioner, Angelus Milling Company, are so confusing as to prevent this respond-

ent from intelligently replying thereto unless further clarified, as prayed herein.

It therefore is impossible to determine with certainty from the allegations of the petition and its exhibits whether the petitioner is claiming an amount paid as processing tax by 1. Niagara Falls Milling Company (either on its own behalf or as agent for the petitioner or Middleport Flour Mills, Inc.), 2. Niagara Falls Milling Co., Inc., 3. Middleport Flour Mills, Inc., or by 4. The petitioner, Angelus Milling Company. It also is impossible to determine with certainty from the allegations of the petition whether Middleport Flour Mills, Inc., is or was a trade name of an individual, a partnership, or a corporation. It also is impossible to determine with certainty whether the petitioner acquired the properties (and particularly this purported claim for refund) of the alleged processor, Middleport Flour Mills, Inc., by assignment, sale, merger, reorganization, or in any manner whatsoever, and, in view of the foregoing reasons, this respondent accordingly is unable to plead intelligently thereto.

In view of the foregoing, the respondent further moves that the order requiring a further and better statement of the nature of petitioner's purported claim, as prayed for herein, require the petitioner to set forth in detail the following facts:

1. A clear and complete statement disclosing the exact status and history of the business relations and existing connections, if any, during the statutory tax period and the statutory period before and after the tax, with reference to the four purported concerns in question, to wit, the Niagara Falls Milling Co., Inc., Niagara Falls Milling Company, Middleport Flour Mills, Inc., and Angelus Milling Company.

2. The true and correct name and description of the processor and the place of processing, together with the quantity in bushels of the particular wheat processed, upon the processing of which an amount was paid as tax, the refund of which purportedly is claimed herein.

3. The true and correct name and description of the taxpayer or taxpayers who actually paid the total amount in question as tax on the processing of wheat, setting forth the

date and amount of each payment and by whom paid, the collector of internal revenue to whom paid, the exact manner or method in which each payment was made and the true capacity of the payor in each instance, *i.e.*, whether acting as principal or agent, etc.

4. If it appears that the processor or processors and the taxpayer or taxpayers with respect to the amount allegedly paid as processing tax, the refund of which is attempted to be claimed herein, was or were other or others than the petitioner, with respect to either all or part of said amount, then that the petitioner be required to set forth in detail the facts by and through which it allegedly came into possession of the right to claim such amount or amounts on its own behalf, together with the right to institute this proceeding thereon.

In the event of the denial of this motion, or in the event the petition is amended by the petitioner, either voluntarily or pursuant to the order of the Board, the respondent requests that he be granted the usual time, as provided in Rule 10 of the Rules of Practice before the United States Processing Tax Board of Review (Second Edition), from the date of service upon him a copy of the order denying this motion or from the date of service upon him of a copy of the amended petition, within which to answer or move further in respect to the petition.

WHEREFORE, it is prayed that this motion be granted.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.
R. F. B.

Of Counsel:
Raymond F. Brown,
Lloyd C. Hooks,
Special Attorneys,
Bureau of Internal Revenue.
LCH/LMO 10/2/41

FILED
11:30 A. M.
Oct. 27, 1941
United States Processing
Tax Board of Review
R

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

MOTION TO EXTEND TIME WITHIN WHICH TO REPLY TO RESPONDENT'S MOTION FOR BETTER STATEMENT OF CLAIM

NOW COMES Petitioner, by its attorney, PREW SAVOY, and respectfully moves for an extension of time of thirty days within which to reply to the Motion for Better Statement of Claim, and to request an opportunity for hearing thereon if such hearing is deemed necessary.

In support of said Motion, your Petitioner shows that Niagara Falls Milling Co., Inc., is in receivership and it has been impossible to obtain access to all of the records required for the purpose of answering said Motion.

Your Petitioner further shows that it has just now received photostatic copies of the monthly returns of Niagara Falls Milling Company and/or Angelus Milling Company, Inc., for the tax period in question; and it will take considerable time to make the proper analysis thereof with a view to answering the Motion of Respondent.

Respondent has no objection to the granting of this Motion.

Respectfully submitted,
(Signed) PREW SAVOY,
Attorney for Petitioner,
Munsey Building,
Washington, D. C.

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

ORDER

Upon motion filed by petitioner, it is

ORDERED, That the time of each party within which to file a brief and to request oral argument with respect to respondent's motion for better statement of claim is hereby extended to and including November 26, 1941.

By the Board.

WILLIAM SCHWARTZ,
Chairman.

Dated October 27, 1941.

Copy sent to Prew Savoy, Esq., by Regis. Mail No. 307,291, 10/27/41. Copy, with copy of Motion, sent to J. P. Wenchel, Esq., by Regis. Mail, No. 307,293, 10/27/41.

C. T.

FILED
3 P. M.
Nov. 21, 1941
United States Processing
Board of Review
R

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

AMENDMENT TO PETITION IN RESPONSE TO MOTION FOR BETTER STATEMENT OF CLAIM

In response to the Motion for a Better Statement of Claim, and as an amendment to the Petition, your Petitioner shows, as follows:

1. Middleport Flour Mills, Inc., is a corporation organized and existing under the laws of the State of New York. Under date of May 11, 1933, the name of the corporation was changed by Resolution of the Board of Directors to Angelus Milling Company, Inc., and on March 26, 1934, to Angelus Milling Company.

2. Niagara Falls Milling Co., Inc., is a corporation organized and existing under the laws of the State of New York, and sometimes uses the name of Niagara Falls Milling Company.

3. Payments of processing tax on wheat, for the account of Niagara Falls Milling Co., Inc., and Middleport Flour Mills, Inc., now Angelus Milling Company, were made to the Collector of Internal Revenue for the 28th District of New York, as follows:

1933	
July 31	$1,102.90
August 7	2,100.85
September 29	9,503.60
October 30	6,000.00
October 30	8,276.70
November 25	6,000.00
November 30	9,075.00
December 30	6,000.00
December 30	11,816.40
Sub-total	$57,875.45
1934	
January 29	$6,000.00
January 29	11,682.20
March 2	6,000.00
March 2	14,058.40
March 31	5,000.00
March 31	18,440.60
April 30	4,000.00
April 30	2,000.00
April 30	16,728.00
May 31	4,000.00
June 1	13,077.60
June 30	18,861.20
June 30	3,583.60
July 30	17,000.00
July 30	3,925.70
August 30	16,000.00
August 30	4,522.60
September 29	11,000.00
September 29	10,116.60
October 31	15,000.00
October 31	6,571.40
November 30	13,000.00
November 30	8,426.20
December 31	11,000.00
December 31	6,901.20
Sub-total	$244,895.40

1935	
January 30	$9,000.00
January 30	12,245.40
March 4	12,000.00
March 1	3,931.40
March 30	10,000.00
March 30	4,000.00
May 3	10,000.00
May 31	3,985.50
May 3	3,433.60
May 31	3,884.40
May 31	7,066.80
June 30	10,765.20
July 15	3,000.00
August 20	3,000.00
September 30	4,596.45
September 30	2,707.73
September 30	3,016.80
October 30	4,020.98
November 2	7,780.20
November 30	8,713.27
December 12	3,250.60
Sub-total	$131,274.42
TOTAL PAYMENTS	$434,045.27
Refund on Cot. Bags Cr. allowed for Charity	606.20
Interest	115.60
TOTAL	$434,767.07

Out of these sums, the following amounts were paid for the account of Middleport Flour Mills, Inc., now Angelus Milling Company, based upon the processing of wheat by it, as listed below:

Date	*Units Processed*	*Tax Paid*
1933		
July		
August	19,505	$862.02
September	20,619	3,489.05
October	24,368	5,447.69
November	21,728	6,185.57
December	26,067	7,728.11
1934		
January-February	63,797	15,991.82
March	18,471	9,933.35
April-May	52,888	16,966.78
June	28,144	8,663.05
July	21,920	8,866.82
August	35,475	8,696.02
September	27,674	8,947.71
October	27,438	9,140.43
November	22,459	9,078.89
December	35,091	7,585.36
1935		
January-February	44,248	13,862.57
March-April	47,597	13,864.29
May	39,000	9,549.69
June	21,237	6,279.70
July	21,143	5,563.14
August	24,998	4,034.66
September	32,852	5,274.70
October	30,187	840.67
Totals	706,906	$186,751.99

Respectfully submitted,

ANGELUS MILLING COMPANY
By (Signed) R. A. O'CONNOR,
President

State of New York
County of Niagara, SS:

R. A. O'CONNOR, being duly sworn, says that he is President of the Petitioner above named, that he had read the foregoing Amendment to Petition in Response to Motion for Better Statement of Claim and is familiar with the statements contained therein and that the facts set forth therein are true to the best of his information and belief.

(Signed) R. A. O'CONNOR

SUBSCRIBED and SWORN to before me this 19th day of November, 1941.

(Signed) JOHN F. MCNUTRY,
Notary Public.

FILED
2:30 P. M.
Nov. 26, 1941
United States Processing
Board of Review
R

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

RENEWAL OF MOTION FOR BETTER STATEMENT OF NATURE OF CLAIM TO APPLY TO PETITION AS AMENDED

Comes now the respondent by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and, in consideration of the patent insufficiency of the purported "Amendment to petition in response to motion for better statement of claim," filed herein by the petitioner on November 31, 1941, the respondent hereby respectfully renews his motion for a better statement of the nature of petitioner's claim, as addressed to the original petition, and requests that the said motion of respondent together with the memorandum brief filed in support thereof shall stand and apply in full force to the petition as so amended. (References hereinafter made to paragraph 4 of said amendment to petition refer to the unnumbered paragraph commencing at the middle of page 3 of said amendment.)

In support of the foregoing renewal of respondent's motion for a better statement of the nature of petitioner's claim and for additional grounds in support thereof, the respondent further submits:

1. While it is alleged in paragraph 1 of the said amendment to petition that the name of Middleport Flour Mills, Inc., was changed by resolutions of the board of directors to Angelus Milling Company, Inc., and later to Angelus Milling Company, respectively, it is not alleged and shown that such purported changes of corporate names were duly effected in the manner prescribed by the laws of the State of New York in such cases made and provided, nor is it alleged and shown that sworn certificates of such purported changes of corporate names were duly filed with the Department of State of the State of New York, and that copies of such certificates, duly certified by the Secretary of State of the State of New York, were, in each instance, duly filed in the office of the Clerk of the County in which the office of the corporation was then located, all of which is more particularly set forth and prescribed in sections 40 and 8, respectively, of the General Corporation Law of the State of New York (Laws 1929, chap. 650, as amended April 15, 1929).

2. While it is alleged in paragraph 2 of the amendment to petition that "Niagara Falls Milling Co., Inc., is a corporation organized and existing under the laws of the State of New York, and sometimes uses the name of Niagara Falls Milling Company", it is not alleged by what authority, if any, the said corporation "sometimes" uses another name and whether or not such other name in fact belongs to some other corporation or association; nor does the petitioner allege or explain by what authority or for what reason *it* apparently (?) refers to Niagara Falls Milling Co., Inc., throughout its petition as Niagara Falls Milling Company.

3. A patent inconsistency and ambiguity appears in the allegations of paragraph 3 and 4 of the amendment to petition, respectively, in that it is alleged in part in paragraph 3 of said amendment that "Payments of processing tax on wheat, for the *account of Niagara Falls Milling Co. Inc. and Middleport Flour Mills, Inc., now Angelus Milling Company*, were made to the Collector of Internal Revenue for the 28th District of New York, as follows:" etc. (*italics* supplied), while in paragraph 4 of said amendment it is alleged in part that "Out of these sums, the following amounts were paid for the *account of Middleport Flour Mills, Inc., now Angelus Milling Com-*

pany based upon the processing of wheat by it, as listed below:" etc. (*italics* supplied). (Here follows a list by months from July 1933 to October 1935, inclusive, purportedly, but not in fact, showing the units allegedly processed each month, together with the respective amounts of the tax paid "for the account of Middleport Flour Mills, Inc., now Angelus Milling Company".)

From the above-quoted allegation in paragraph 3 of the amendment to petition it first would appear that the payments of processing tax on wheat were made to the Collector of Internal Revenue for the *one joint account* "of Niagara Falls Milling Co. Inc. and Middleport Flour Mills, Inc., now Angelus Milling Company", while from the above-quoted allegation in paragraph 4 of the amendment it would appear that a definite amount was actually paid to the Collector each month for the *separate* "account of Middleport Flour Mills, Inc., now Angelus Milling Company".

4. Another glaring inconsistency appearing in the allegations of the amendment to petition is as follows: While it is alleged in paragraph 1 of the amendment to petition that under date of *May 11, 1933*, the name of Middleport Flour Mills, Inc., was changed to Angelus Milling Company, Inc., and on *March 26, 1934*, to Angelus Milling Company, nevertheless it is alleged in paragraph 3 that processing tax payments *beginning in July 1933* were made "for the account of Niagara Falls Milling Co., Inc., and *Middleport Flour Mills Inc.*", while in paragraph 4 of said amendment it is alleged in part that "Out of these sums, the following amounts were paid for the account of *Middleport Flour Mills, Inc.*" etc., all of this being in spite of the fact that *Middleport Flour Mills, Inc.*, allegedly had no official existence subsequent to *May 11, 1933!*

5. In short, the respondent submits that the record in this proceeding clearly reflects that either the petitioner in truth has no valid case and cannot state the actual facts without disclosing such invalidity *or* the petitioner is guilty of inexcusable looseness in pleading. The respondent, therefore, in closing again urges that the petitioner be required by the order of this Board to dispel the clouds of doubt, uncertainty, and suspicion surrounding this proceeding by filing a clear, complete, and detailed statement setting forth all the facts in connection

with the foregoing matters and also the matters heretofore enumerated in the original motion of respondent for a better statement of the nature of petitioner's claim together with the memorandum brief of respondent in support thereof, and particularly in the following respects:

The petitioner should be required to detail at length all the facts in relation to the alleged mutual business operation of Niagara Falls Milling Co., Inc., (or Niagara Falls Milling Company) and Middleport Flour Mills, Inc., (or Angelus Milling Company, Inc., or Angelus Milling Company) during the statutory tax period and the period before and after the tax. (In this connection it is submitted that it does not appear from the allegations of the petition whether or not the petitioner was in business during the statutory period before and after the tax.) Such statement of facts should disclose:

(a) The principal office or place of business of each corporation, respectively, at all times during the periods in question.

(b) The exact location of the mill or mills for the processing of wheat operated by each corporation during the periods in question.

(c) The exact manner or method of operation of the mill or mills above mentioned, stating in each instance whether or not the processor-corporation was the owner of the mill or mills operated or whether it was operating such mill or mills under a lease or some other arrangement, stating the details thereof.

(d) If it should appear with respect to the foregoing matters that during any part of said periods the corporations in question (particularly Niagara Falls Milling Co., Inc., and Middleport Flour Mills, Inc., "now Angelus Milling Company") were operating the same mill or mills either at the same or at different times, then full details should be given as to the exact operating arrangements, financial and otherwise.

(e) In view of the allegation in paragraph 10(a) of the original petition that "All of the wheat processed by Petitioner during the period July 9, 1933 to January 6, 1936, both dates inclusive, was purchased for its account out of monies belonging to

Petitioner by Niagara Falls Milling Company", the petitioner also should be required to state the facts in regard to the purchase of wheat processed by petitioner during the statutory period before and after the tax. As to *all* periods the petitioner should be required to state the *exact manner* in which such wheat allegedly was purchased "for its account" by Niagara Falls Milling Company, stating 1, the name of the corporation in which such purchases actually were made and the exact method of payment in each instance, 2, the exact manner and place of storage of wheat so purchased, stating whether or not such wheat was stored separately from or commingled with wheat purchased by Niagara Falls Milling Co., Inc., on its own account.

(f) All facts in regard to the disposition of the flour produced from the wheat allegedly processed by the petitioner should be set forth, stating whether or not such flour was stored on the premises of the petitioner and if not just what arrangements were made for the storage of such flour.

(g) The manner of the sale of the flour produced from the wheat allegedly processed by the petitioner during the statutory periods in question should be alleged, stating whether such sales actually were made by the petitioner in its own name and payments directly received therefor or in some other manner, setting forth the actual selling arrangements employed in either case and the facts in regard to the disposition of the proceeds of such sales.

(h) Whether or not the Niagara Falls Milling Company acted in part as the agent of the petitioner in filing the claim, described in paragraph 5 of the original petition, for the refund of processing tax "paid on account of the processing of wheat by it and by Angelus Milling Company" the petitioner herein, a purported copy of said prior claim being attached to the original petition as Exhibit "E".

(i) In view of the allegation in paragraph 10(c) of the original petition to the effect that "Niagara Falls Milling Company and Middleport Flour Mills, Inc., now Angelus Milling Company, had common officers and a common bank account, where the monies belonging to each were commingled", the peti-

tioner, in the interest of clarity, should be required to elucidate further and explain such an unusual alleged situation in the "common" affairs of the corporations in question, and especially should the petitioner be required to state whether or not the two corporations in question also had "common" employees and "common" offices for the transaction of business and a "common" mill for the processing of wheat. In this connection, the petitioner also should be required to state in what name the alleged "common" bank account was carried, who signed the checks in payment of the manufacturing and administrative expenses in connection with the alleged processing of wheat by the petitioner and in connection with the payment of expenses incurred in the sale of the flour produced from the alleged processing of such wheat and in whose name were the checks made payable in payment for the flour so sold; whether or not the officers of the petitioner-corporation drew any salaries for their alleged services in such capacity and if so the name of the corporation which signed such salary checks as the maker thereof should be stated.

(j) Since it appears from the allegation in paragraph 4, pages 3 and 4, of the amendment to petition that the total sum of $186,751.99 allegedly was paid as tax "for the account of Middleport Flour Mills, Inc., now Angelus Milling Company", the petitioner should be required to explain the difference between the above amount and the amount of $145,839.12 alleged in paragraph 3 of the original petition as the amount paid by petitioner or which it "had paid for its account * * * on account of processings of wheat by it". Reference to the purported "claim" of the petitioner attached to the position as Exhibit "C" shows that the latter amount of $145,839.12 was arrived at through a purported "allocation of refund due Niagara Falls Milling Company and Middleport Flour Mills, Inc. (now Angelus Milling Co., Inc.)". (See Schedule A, Ex. "C" petition) Such purported allocation apparently attempts to divide the total combined amount allegedly paid as processing taxes by or on behalf of both corporations, between the two corporations on a pro rata basis according to the quantity and value

of the flour allegedly sold by each. However, no such explanation appears on pages 3 and 4 of said amendment to petition as to *how* the petitioner *now* is able to arrive at the *new* figures appearing thereon allegedly showing the number of units processed each month (?) and the tax paid "for the account" of the petitioner with respect thereto in the total alleged sum of $186,751.99. Since the petitioner does not purport to claim the refund of more than the said sum of $145,839.12, this Board also should be informed as to the source and identity of the sum of $40,912.87 (representing the difference between the foregoing amounts), which latter amount the petitioner apparently admits shifting.

(k) While the petitioner sets forth on pages 2 and 3 of its amendment to petition a list of the payments of processing tax allegedly made "for the account of Niagara Falls Milling Co. Inc., and Middleport Flour Mills, Inc., now Angelus Milling Company", it is self-evident that this is *far* from constituting a compliance with the provisions of paragraph 3, page 6, of respondent's original motion for a better statement of the nature of petitioner's claim, wherein it is prayed that the petitioner be required to set forth in detail:

"*The true and correct name and description of the taxpayer or taxpayers who actually paid the total amount in question as tax on the processing of wheat*, setting forth the date and amount of each payment *and by whom paid*, the collector of internal revenue to whom paid, *the exact manner or method in which each payment was made and the true capacity of the payor in each instance, i.e., whether acting as principal or agent, etc.*" (*Italics* supplied)

The portions in *italics* of the above except from respondent's motion are not covered or complied with by the petitioner in its amendment to petition. The respondent respectfully insists that it is of the utmost importance in this proceeding that the petitioner be required to inform the respondent and this Board at the outset of the exact details in connection with the payments as processing tax allegedly made "for the account of Niagara Falls Milling Co., Inc., and Middleport Flour Mills, Inc., now Angelus Milling Company" (par. 3, p. 1, amendment to petition)

and "for the account of Middleport Flour Mills, Inc., now Angelus Milling Company" (par. 4, p. 3, amendment to petition).

WHEREFORE, in view of the matters set forth herein and in the memorandum brief heretofore filed in support of respondent's original motion for a better statement of the nature of petitioner's claim, it is prayed that the said motion, as herein renewed and supplemented to apply to the petition as amended, be granted.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Of Counsel:
Raymond F. Brown,
Lloyd C. Hooks,
Special Attorneys,
Bureau of Internal Revenue.

LCH/LMO 11/25/41

FILED
3:05 P. M.
Dec. 29, 1941
United States Processing
Tax Board of Review
H.A.

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

MOTION FOR LEAVE TO FILE AMENDED PETITION

NOW COMES the Petitioner herein, by its counsel, and respectfully moves for leave to file an Amended Petition, in lieu of the Petition, of the Amendment to Petition in response to Motion for a Better Statement of Claim, and the Amendments to the Petition, granted upon Petitioner's oral motions at the hearing upon Respondent's Motion for Better Statement of Nature of Claim, December 19, 1941.

In support of this Motion your Petitioner respectfully shows that the granting of this Motion will simplify the pleadings by putting in one document all of the material facts alleged in the foregoing documents and the amendments which the Presiding Officer ordered be made at the hearing of December 19, 1941. Such simplification will make it easier for the Respondent to file a responsive reading and will be more convenient for this Board.

Respectfully submitted:

(Signed) PREW SAVOY,
Counsel for Petitioner,
Munsey Building,
Washington, D. C.

December 29, 1941.

FILED
3:05 P. M.
Dec. 29, 1941
United States Processing
Tax Board of Review

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 398

AMENDED PETITION

The above-named Petitioner hereby petitions, under the Revenue Act of 1936, for a hearing on the merits of its claim for the refund of processing tax on wheat, paid under the Agricultural Adjustment Act of May 12, 1933, as amended, together with interest thereon, and as a basis for this proceeding alleges, as follows:

1. Petitioner is a corporation organized and existing under the laws of the State of New York, with its principal office at Niagara, New York. On June 13, 1933, the name of Petitioner was changed from "Middleport Flour Mills, Inc." to "Angelus Milling Company, Inc.". It is sometimes called "Angelus Milling Company". (EXHIBIT E attached)

2. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner was a processor of wheat.

3. Niagara Falls Milling Co., Inc., sometimes called "Niagara Falls Milling Company", is a corporation organized and existing under the laws of the State of New York. During the period July 9, 1933, to January 6, 1936, both dates inclusive, said corporation was a processor of wheat.

4. For the period July 9, 1933, to January 31, 1935, joint returns on account of the processing of wheat by Petitioner and Niagara Falls Milling Co., Inc., were filed with the Collec-

tor of Internal Revenue for the 28th District of New York, and tax in the sum of $324,016.25 was paid on account of such processings.

5. For the period February 1, 1935, to November 30, 1935, both dates inclusive, returns were filed in the name of Niagara Falls Milling Co. on account of the processings of wheat by Petitioner and Niagara Falls Milling Co., Inc., with the Collector of Internal Revenue for the 28th District of New York, and tax, in the sum of $110,029.02, was paid on account of such processings.

6. Of the aforesaid sums paid as processing tax on wheat, the following amounts were paid on account of the processings by Petitioner listed below, out of monies belonging to Petitioner:

Date	*Units Processed*	*Tax Paid*
1933		
July		
August	19,505	$862.02
September	20,619	3,489.05
October	24,368	5,447.69
November	21,728	6,185.57
December	26,067	7,728.11
1934		
January-February	63,797	15,991.82
March	18,471	9,933.35
April-May	52,888	16,866.78
June	28,144	8,663.05
July	21,920	8,866.82
August	35,475	8,696.02
September	27,674	8,947.71
October	27,438	9,140.43
November	22,459	9,078.89
December	35,091	7,585.26
1935		
January-February	44,248	13,862.57
March-April	47,597	13,864.29
May	39,000	9,549.69
June	21,237	6,279.70
July	21,143	5,563.14

August	24,998	4,034.66
September	32,852	5,274.70
October	30,187	840.67
	706,906	$186,751.99

7. On or about January 29, 1936, claims were filed on Form 843 by "Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc.", with the Collector of Internal Revenue for the 28th District of New York, for the refund of processing taxes on wheat paid by Petitioner and Niagara Falls Milling Co., Inc., in the total sum of $454,045.27 (EXHIBITS A-1, 2 and 3 attached to Petition) paid on account of the processing of wheat by them.

8. After the passage of the Revenue Act of 1936, and prior to January 1, 1940, i.e., on June 30, 1937 (R. 84), Niagara Falls Milling Company filed a claim for the refund of processing tax in the sum of $436,231.73, with the Collector of Internal Revenue for the 28th District of New York, paid on account of the processing of wheat by it and by Petitioner. (EXHIBIT B attached to Petition)

9. After the passage of the Revenue Act of 1936, and prior to January 1, 1940, i.e., on or about August 15, 1938, Petitioner filed a claim for the refund of $145,839.12, paid out of its monies, on account of the processing of wheat by it, with the Collector of Internal Revenue for the 28th District of New York, designating this claim as "Amendment to Claim". (EXHIBIT C attached to Petition)

10. Under date of May 24, 1941, the Commissioner, in a letter sent by registered mail, disallowed the claim of Petitioner mentioned in paragraph 9, in its entirety. (EXHIBIT D attached to Petition)

11. The taxes involved are processing taxes paid out of Petitioner's monies on account of the first domestic processing of wheat by Petitioner. The amount in controversy is $145,839.12, plus interest.

12. Petitioner avers that in rejecting said claim for refund manifest error occurred and intervened to the prejudice of Petitioner who now assigns the following errors and each of

them, which it avers occurred in the rejection of said claim for refund:

(a) The Commissioner erred in holding that Petitioner was not the taxpayer of any amount of tax in controversy.

(b) The Commissioner erred in failing to give consideration to, and the usual hearings on, Petitioner's claim.

(c) The Commissioner erred in holding that Petitioner failed to establish that it bore the burden of the tax, refund of which is claimed.

(d) The Commissioner erred in failing to hold that Petitioner established that it bore the burden of the tax, refund of which is claimed.

(e) The Commissioner erred in disallowing the refund of tax claimed.

(f) The Commissioner erred in failing to allow the refund of the tax claimed.

13. The facts upon which Petitioner relies as the basis of this proceeding are, as follows:

(a) All of the wheat processed by Petitioner during the period July 9, 1933, to January 6, 1936, both dates inclusive, was paid for out of monies belonging to Petitioner.

(b) All of the processing tax on wheat paid on account of the foregoing processing of wheat by Petitioner was paid out of the monies belonging to Petitioner.

(c) Niagara Falls Milling Company and Middleport Flour Mills, Inc., now Angelus Milling Company, Inc., the Petitioner during the tax period, had common officers and a common bank account, where the monies belonging to each were commingled, and out of which the common officers made the foregoing payments on behalf of the corporation concerned.

(d) Petitioner did not shift the burden of the processing tax on wheat in the selling price of the articles produced from the wheat involved in this proceeding, nor change the quantity of the wheat in any article, nor change the quality of any article in any manner whatsoever during the tax period, so that the tax was not recovered through inclusion thereof by Petitioner or any other person in the price of the articles

produced from the wheat involved in this proceeding, nor did Petitioner shift the tax burden to the producer of wheat.

(e) Petitioner was not reimbursed on account of any part of the tax paid in the sum of $145,839.12.

(f) Petitioner was not relieved of the burden of the tax, nor did Petitioner shift such burden directly or indirectly in any manner whatsoever, including a shift or relief through the payment of rent, salaries, wages, advertising but not limited thereto, nor was Petitioner relieved of the burden through cancellation of any mortgage, lease, contract, or otherwise, nor was the Petitioner relieved by reason of any extraordinary capital gains or through the sale of any article produced from any commodity other than wheat, nor was the Petitioner relieved by reason of any reduction in any excise tax or import duty, reduced by reason of the imposition of the processing tax on wheat, nor was there any understanding or agreement, written or oral, existing whereby Petitioner may be relieved of the burden of such amount, be reimbursed therefor or may shift the burden thereof.

13. Petitioner desires that the hearing may be held in Washington, D. C.

WHEREFORE, the Petitioner prays that this Board may hear the proceedings and that the Board may reverse the holding of the Commissioner, and order the refund of $145,839.12, together with interest thereon from the dates of payment thereof.

ANGELUS MILLING COMPANY, INC.

By (Signed) PREW SAVOY,

Counsel for Petitioner.

District of Columbia,
City of Washington—SS:

PREW SAVOY, being duly sworn, says that he is Counsel for the Petitioner above named, that he has read the foregoing Petition and is familiar with the statements contained therein and that the facts set forth therein are true to the best of his information and belief.

(Signed) PREW SAVOY.

SUBSCRIBED and SWORN to before me this 29th day of December, 1941.

(Signed) WALLACE STOEVER,
Notary Public—D. C.

EXHIBIT "E"

EXHIBIT "E"

EDWARD J. FLYNN
SECRETARY OF STATE

FRANK S. SHARP
Deputy Secretary of State
Chief of Division

STATE OF NEW YORK
DEPARTMENT OF STATE
DIVISION OF CORPORATIONS
ALBANY June 13, 1933.

Middleport Flour Mills, Inc.,
Lockport,
N. Y.

Dear Sirs:

Certificate of change of name of

MIDDLEPORT FLOUR MILLS, INC.

to

ANGELUS MILLING COMPANY, INC.

has been received and filed today as requested.

Fee $25.00 paid.

Yours truly,

Frank S. Sharp

Chief of Division.

RECEIVED
3:10 P. M.
Jan. 16, 1942
United States Processing
Tax Board of Review
R.

State of New York
County of Niagara—SS:

R. A. O'CONNOR, being duly sworn, says that he is President of the Petitioner above named, that he has read the foregoing Petition and is familiar with the statements contained therein and that the facts set forth therein are true to the best of his information and belief.

(Signed) R. A. O'CONNOR,
President.

SUBSCRIBED and SWORN to before me this 14th day of January, 1942.

(Signed) JOHN D. MAHONEY,
(SEAL) *Notary Public.*

FILED
Jan. 16, 1942
United States Processing
Tax Board of Review

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

ORDER

Respondent having filed a "Renewal of Motion for Better Statement of Nature of Claim to apply to Petition as Amendment," which motion was submitted upon the oral arguments and briefs of the parties; and petitioner, during the course of said oral argument, having been granted permission to further amend its petition, and having filed a motion for Leave to File Amended Petition, the premises considered, it is

ORDERED, That the petitioner's motion for Leave to File Amended Petition be, and it is hereby granted, and it is

FURTHER ORDERED, That respondent's motion for Better Statement of Nature of Claim, as renewed, be and the same is hereby denied, and respondent is given to and including February 16, 1942, to answer.

Reviewed by the Board.

(Signed) PERCY S. CREWE,
Member.

Dated: January 20, 1942.

Copy sent to Prew Savoy, Esq., by Regis. Mail No. 307,573, 1/20/42. Copy sent to J. P. Wenchel, Esq., by Regis. Mail No. 307,572, 1/20/42.

H. A.

FILED
12:20 P. M.
Feb. 16, 1942
United States Processing
Tax Board of Review
H. A.

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

MOTION TO DISMISS

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves that the petition in the above-entitled proceeding be dismissed on the following grounds:

(1) It appears on the face of the record in this proceeding that this Board is without jurisdiction to proceed further in the premises for the following reasons:

(a) The purported copy of the alleged "claim for refund" attached to the original petition herein as Exhibit "C", the alleged disallowance of which is sought to be reviewed herein, shows on its face that it is not a true and complete claim but only a purported "AMENDMENT TO CLAIM".

(b) The alleged copy of the so-called "AMENDMENT TO CLAIM", attached to the original petition herein as Exhibit "C", the alleged disallowance of which is sought to be reviewed herein, shows on its face that it is not a valid claim for refund, prepared in accordance with the mandatory and jurisdictional requirements of the controlling statutory provisions and the rules and regulations promulgated pursuant thereto.

1. The respective "Schedules" of the official "P. T. Form 79", on which the so-called "AMENDMENT TO CLAIM" allegedly was executed, which schedules were required to be filled in by the claimant-petitioner, were not so filled in but were left entirely in blank. The said "AMENDMENT TO CLAIM" was therefore a nullity as constituting an alleged "claim for refund".

2. The so-called "AMENDMENT TO CLAIM" does not contain "margins" computed in accordance with section 907 of the Revenue Act of 1936, 49 Stat. 1750-53 (U. S. C., 1940 Ed., title 7, sec. 649), and Article 605 of Regulations 96, promulgated pursuant thereto.

3. The so-called "AMENDMENT TO CLAIM" shows on its face that the claimant-petitioner has not complied with the provisions of section 903 of the Revenue Act of 1936, 49 Stat. 1747, as amended by section 405 of the Revenue Act of 1939, 53 Stat. 834 (U. S. C., 1940 Ed., title 7, sec. 645), and Articles 201 and 202 of Regulations 96, respectively, promulgated pursuant thereto, in that said "AMENDMENT TO CLAIM" was not prepared in accordance with the printed instructions on the prescribed, official "P. T. Form 79", and does not set forth in detail and under oath each ground upon which a refund is claimed, and is not a true and complete claim substantiated by clear and convincing evidence of all facts necessary to establish same to the satisfaction of the respondent or this Board.

4. It appears on the face of the so-called "AMENDMENT TO CLAIM" that the claimant-petitioner has not complied with the provisions of section 902 of the Revenue Act of 1936, 49 Stat. 1747 (U. S. C., 1940 Ed., title 7, sec. 644), and Article 204 of Regulations 96, promulgated pur-

suant thereto, in that the claimant submitted no evidence to the respondent in support of its "claim", in the appropriate "schedules" provided therefor on the official claim form, from which the respondent could legally have determined that the claimant-petitioner bore the burden of any amount allegedly paid as processing tax, and that it had not been or might not be relieved thereof, nor reimbursed therefor, and had not shifted such burden, directly or indirectly, through or by any of the means set forth in section 902(a) of the Act, *supra*; or that it had repaid such amount unconditionally to its vendees who bore the burden thereof, as provided in section 902(b) of the Act, *supra*.

(c) It is nowhere affirmatively alleged of record by the petitioner, either in the "Amended Petition" *proper* or in the so-called "AMENDMENT TO CLAIM", a purported copy of which is attached to the original petition herein as Exhibit "C", (the alleged disallowance of which is sought to be reviewed herein) that the claimant-petitioner *was the taxpayer* with respect to any amount allegedly paid as tax on the processing of wheat by the claimant-petitioner, the refund of which is purportedly sought herein.

(2) The amended petition is not properly verified as required by Rule 5(i) of the Rules of Practice before the United States Processing Tax Board of Review (Second Edition).

(a) The purported verification as amended of the amended petition herein shows on its face that it was executed merely upon "information and belief".

(b) The purported verification as amended of the amended petition herein fails to comply with the requirements of this Board with respect thereto as contained in Form No. 1, in the "Appendix" to the Board's Rules of

Practice, *supra*, the same being a model form of petition as prescribed by this Board in which the approved form for the verification of a petition is set forth (on page 17) as follows:

"STATE OF .....
County of .....—SS:

....., being duly sworn, says that he is the petitioner (if a corporation, or fiduciary, state title of office or trust of person verifying and that he is duly authorized to verify the foregoing petition) above named; that he had read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

(Signed).....

Subscribed and sworn to before me this ..... day of ....., 19.....

(Signed).....
(Official title)"

In the event the amended petition is further amended by the petitioner either voluntarily or pursuant to the order of the Board or in the event of the denial by the Board of this motion, the respondent requests that he be granted the usual time, as provided in Rule 10 of the Board's Rules of Practice, *supra*, from the date of service upon him of a copy of the amended petition as so further amended or from the date of service upon him of a copy of the order denying this motion, within which to answer or move further in respect of the petition.

WHEREFORE, it is prayed that this motion be granted.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Of Counsel:
Raymond F. Brown,
Lloyd C. Hooks,
Special Attorneys,
Bureau of Internal Revenue.
LCH/LMO 2/11/42

FILED
10:45 A. M.
June 12, 1942
United States Processing
Tax Board of Review
R.

State of New York
County of Niagara—SS:

R. A. O'CONNOR, being duly sworn, says that he is President of the Petitioner herein, Angelus Milling Company, Inc., and that he is duly authorized to verify the foregoing Petition; that he has read the foregoing Petition and is familiar with the statements contained therein, and the facts stated therein are true except as to those facts stated to be upon information and belief, and those facts he believes to be true.

(Signed) R. A. O'CONNOR,
President.

SUBSCRIBED and SWORN to before me this 10th day of June, 1942.

(Signed) JOHN D. MAHONEY,
Notary Public.

(SEAL)

FILED
11:47 A. M.
July 25, 1942
United States Processing
Tax Board of Review
e.m.

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

MOTION TO PERMIT PRIOR MOTION TO APPLY TO PETITION AS AMENDED

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and respectfully submits that oral argument before Presiding Board Member John W. Edwards on respondent's motion to dismiss the petition herein was duly heard on June 4, 1942, upon the conclusion of which argument the decision of the Board on said motion was reserved. It is further shown that upon said argument counsel for petitioner requested and was granted permission to file an amended verification to the petition. However, the transcript of the proceedings does not reflect that any provision was made for the motion to dismiss of respondent to stand and apply to the petition after amendment. The amended verification in question was duly filed by counsel for petitioner on June 12, 1942.

WHEREFORE, in order to clarify the status of the record herein, it is respectfully prayed that an order be entered permitting the motion to dismiss of the respondent to stand and apply to the petition as so amended.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Of Counsel:
Raymond F. Brown,
Lloyd C. Hooks,
Special Attorneys,
Bureau of Internal Revenue.
LCH/vd 7-23-42

GRANTED
July 27, 1942
(Signed) JOHN W. EDWARDS,
Member,
U. S. Processing Tax
Board of Review

UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No: 398

ORDER

On February 16, 1942 the respondent filed a motion to dismiss the amended petition in this proceeding on the following grounds: (1) that the Board is without jurisdiction to proceed further since the copy of the alleged claim for refund attached to the petition is not a true and complete claim, but only a purported amendment to claim; (2) that the said amendment to claim does not constitute a valid claim for these reasons: (a) that the schedules on the claim, Form P. T. 79, were not filled out, but were left entirely blank, (b) that it does not contain "margins" computed in accordance with section 907 of the Revenue Act of 1936, (c) that it was not prepared in accordance with the printed instructions appearing thereon and, inter alis, does not set forth in detail and under oath each ground upon which refund is claimed and (d) that no evidence was submitted to the respondent in support of such claim in the appropriate schedules provided therefor on the official claim form, from which the respondent could have determined, inter alis, that the petitioner bore the burden of any amount alleged to have been paid as processing tax; (3) that no affirmative allegation is made "that the claimant-petitioner *was the taxpayer* with respect to any amount allegedly paid as tax on the processing of wheat by the claimant-petitioner"; and (4) that the amended petition is not properly verified as required by Rule 5(i) of the Board's Rules of Practice.

Upon motions filed by the respondent the date for presenting briefs was extended from March 9, 1942 to May 9, and from May 9 to May 29, 1942. Briefs were filed by the parties

and oral argument was had on June 4, 1942. On June 12, 1942 the petitioner filed a verification of the petition which complies with the Board's Rules. The premises considered, it is

ORDERED that the respondent's motion be and it is hereby denied, and it is

FURTHER ORDERED that the respondent be and he is hereby granted to and including August 24, 1942 within which to answer.

Reviewed by the Board.

(Signed) JOHN W. EDWARDS,
Member.

Dated: August 5, 1942.

Schwartz dissents for the reasons stated in attached memorandum.

ANGELUS MILLING COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

The claim for refund filed by this petitioner does not comply with Section 903 of the Revenue Act of 1936 and Articles 201, 202, 204 and 605 of Regulations 96 as prescribed by respondent. The fact that petitioner informed respondent that it partly based its claim upon the claim filed on Form 843 in the names of Niagara Falls Milling Co., Inc. and/or Middleport Flour Mills, Inc. (the latter being the former name of this petitioner) was insufficient to supply the defects that are inherent in petitioner's claim even if the data contained in such Form 843 could be considered a part of petitioner's claim. For these reasons, I dissent from the order denying respondent's motion.

WILLIAM SCHWARTZ,
Chairman.

FILED
3:28 P. M.
Aug. 21, 1942
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Tax Board of Review
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UNITED STATES PROCESSING TAX BOARD OF REVIEW

ANGELUS MILLING COMPANY,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 398

ANSWER

Comes now the respondent in the above-styled proceeding, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein on December 29, 1941, as further amended on June 12, 1942, admits, denies, and alleges as follows:

1. Because of lack of knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the amended petition, the respondent denies the same.

2. Denies the allegation in paragraph 2 of the amended petition.

3. The respondent admits that Niagara Falls Milling Co., Inc., was at one time a coroporation organized and existing under the laws of the State of New York, as alleged in paragraph 3 of the amended petition, but further alleges on information and belief that the said corporation is now and has been for some time in bankruptcy. The respondent admits that Niagara Falls Milling Co., Inc., was a processor of wheat during the period July 9, 1933 to January 6, 1936, both dates inclusive, as alleged in paragraph 3 of the amended petition.

4. Denies the allegations in paragraph 4 of the amended petition, whether alleged directly or indirectly.

5. Denies the allegations in paragraph 5 of the amended petition, whether alleged directly or indirectly.

6. Denies the allegations in paragraph 6 of the amended petition, whether alleged directly or indirectly.

7. Denies the allegations in paragraph 7 of the amended petition, whether alleged directly or indirectly.

8. Denies the allegations in paragraph 8 of the amended petition, whether alleged directly or indirectly.

9. Denies the allegations in paragraph 9 of the amended petition, whether alleged directly or indirectly.

10. Admits that on May 23, 1941, the respondent, in a letter sent by registered mail, disallowed in its entirety a certain claim in the amount of $145,839.12, purportedly filed by Angelus Milling Company, but denies the other allegations in paragraph 10 of the amended petition.

11. Denies the allegations contained in paragraph 11 of the amended petition, whether alleged directly or indirectly.

12 (a), (b), (c), (d), (e), (f). Denies that error was committed by the respondent in the disallowance of the claim for refund in question, as alleged in paragraph 12 (a), (b), (c), (d), (e) and (f) of the amended petition, respectively.

13 (a). Denies the allegations in paragraph 13(a) of the amended petition, whether alleged directly or indirectly.

(b). Denies the allegations in paragraph 13(b) of the amended petition, whether alleged directly or indirectly.

(c). Denies the allegations in paragraph 13(c) of the amended petition, whether alleged directly or indirectly.

(d). Without admitting, but expressly denying that the petitioner was the taxpayer, processor, or proper party-claimant, with respect to any amount allegedly paid as tax on the processing of wheat purportedly involved in this proceeding, the respondent, in the alternative and for the purpose of this answer, denies the allegations in paragraph 13(d) of the amended petition, whether alleged directly or indirectly.

(e). Without admitting, but expressly denying that the petitioner was the taxpayer, processor, or proper party-claimant, with respect to any amount purportedly paid as processing tax herein, the respondent, in the alternative and

for the purpose of this answer, denies the allegation in paragraph 13(e) of the amended petition.

(f). Without admitting, but expressly denying that the petitioner was the taxpayer, processor, or proper party-claimant, with respect to any amount allegedly paid as tax on the processing of wheat purportedly involved in this proceeding, the respondent, in the alternative and for the purpose of this answer, denies the allegations in paragraph 13(f) of the amended petition, whether alleged directly or indirectly.

14. The allegation in the second consecutive paragraph numbered "13" of the amended petition, with respect to the place where the petitioner desires a hearing to be held, requires no answer from the respondent.

15. Denies generally and specifically each and every allegation in the amended petition not hereinabove admitted, qualified, or denied.

16. Further answering said amended petition, and as an affirmative defense thereto, the respondent alleges that the Board is without jurisdiction to entertain this proceeding, in that it appears on the face of the purported claim for refund, the disallowance of which is sought to be reviewed herein, (an alleged copy of which purported claim is attached as Exhibit "C" to the original petition herein filed on August 20, 1941) that the same is not a valid claim for refund, prepared in accordance with the mandatory and jurisdictional requirements of the controlling statutory provisions and the rules and regulations promulgated pursuant thereto, as more particularly set forth in respondent's motion to dismiss, filed herein on February 16, 1942, which motion was denied by the Board in its order dated August 5, 1942.

17. For a second affirmative defense to the amended petition herein, the respondent alleges that the Board is without jurisdiction to entertain this proceeding in that it is nowhere affirmatively alleged of record by the petitioner, either in the amended petition proper or in the purported claim for refund, an alleged copy of which is attached to the original petition herein as Exhibit "C", that the claimant-petitioner *was the taxpayer* with respect to any amount allegedly paid as tax on

the processing of wheat, the refund of which is purportedly sought herein.

18. For a third affirmative defense to the amended petition herein, the respondent alleges that the Board is without jurisdiction to entertain this proceeding in that the petitioner was neither the taxpayer, processor, nor proper party-claimant with respect to any amount allegedly paid as tax on the processing of wheat, the refund of which is purportedly sought herein.

WHEREFORE, respondent prays that the Board determine that the petitioner is not entitled to the refund of any amount allegedly paid as processing tax under the Agricultural Adjustment Act.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Of Counsel:
Raymond F. Brown,
Lloyd C. Hooks,
Special Attorneys,
Bureau of Internal Revenue.

The Tax Court
of the United States
FILED
Jan. 29, 1943
Enr. .....
Dkt. .....
Cal. .....
Stat. .....

THE TAX COURT OF THE UNITED STATES

ANGELUS MILLING COMPANY, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 398 P.T.

MOTION TO DISMISS ON JURISDICTIONAL GROUNDS

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and respectfully submits that this Honorable Court is without jurisdiction to proceed to a hearing and determination of this case on the merits, upon the amended petition, filed herein on December 29, 1941, and that this case should be dismissed on jurisdictional and other grounds. It is therefore moved that this case be dismissed upon the following grounds:

1. The alleged copy of the so-called "AMENDMENT TO CLAIM" attached to the original petition filed herein on August 20, 1941, as Exhibit "C," which constitutes the purported "claim for refund" the disallowance of which is sought to be reviewed herein, shows on its face that it is not a valid claim for refund prepared on the official Bureau "P. T. Form 79" in accordance with the printed instructions thereon and in compliance with the mandatory and jurisdictional requirements of the controlling statutory provisions and the Treasury Regulations promulgated pursuant thereto.

(a) The purported copy of the alleged claim for refund attached to the original petition filed herein on August 20, 1941, as Exhibit "C," the disallowance of which is sought to be reviewed herein, shows on its face that it is not a true, complete, and independent claim, but only a purported "AMENDMENT TO CLAIM."

(b) Further examination of said Exhibit "C" to the original petition discloses that the same purports to be an "amendment" to a certain claim for refund allegedly "filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc.", and that "Originally the claim in the name of both Companies was for the sum of $434,045.27." It further appears from Exhibits "A-1," "A-2," and "A-3," attached to the original petition herein, that the said claim, as allegedly filed originally in the name of both companies for the sum of $434,045.27, in fact consisted of three separate claims, each on Treasury Department Form 843 for the recovery of taxes allegedly collected illegally, the amounts of said prior claims on Form 843, as aforesaid, totaling $434,045.27.

(c) A further examination of Exhibits "A-1," "A-2," and "A-3," attached to the original petition herein, affirmatively discloses that the actual processor and taxpayer with respect to the three separate amounts, totaling $434,045.27, theretofore claimed on Forms 843, as aforesaid, was "Niagara Falls Milling Co., Lockport, N. Y." and not the petitioner, Angelus Milling Company, as more fully appears from an itemized statement of alleged tax payments, attached to and accompanying each of said claims on "Form 843," as aforesaid.

(d) It appears on the face of the so-called "AMENDMENT TO CLAIM" that the claimant-petitioner in this case made no processing tax payments to the collector of internal revenue, in view of the fact that Schedule "A" of the official "P. T. Form 79," entitled "PROCESSING TAX PAYMENTS BY CLAIMANT TO COLLECTOR OF INTERNAL REVENUE," was left entirely blank.

(e) As a matter of fact, *all* of the respective "Schedules" of the official "P. T. Form 79," on which the so-called "AMENDMENT TO CLAIM" was executed, which schedules were required to be filled in by the claimant-petitioner, were not so filled in but were left entirely in blank.

(f) The so-called "AMENDMENT TO CLAIM" does not contain "average margins" computed in accordance with section 907 of the Revenue Act of 1936, 49 Stat. 1751-53 (U. S. C. 1940 ed., title 7, sec. 649), and Article 605 of Treasury Regulations 96, promulgated pursuant thereto.

(g) Having wholly failed to set forth, as aforesaid, in the respective schedules of the official claim form any of the facts, figures, and information, constituting the statutory "prima-facie evidence" provided for in section 907 of the Revenue Act of 1936, *supra*, the claimant-petitioner further failed and refused to set forth any "other evidence" in support of its purported claim for refund, said "OTHER EVIDENCE" being called for under Schedule "D-2" of the official "P. T. Form 79" entitled "OTHER EVIDENCE," this schedule being left entirely blank in the same manner as the other schedules, as aforesaid.

(h) The contents of the three prior "claims" on Treasury Department "Form 843" totaling $434,045.27 (Ex's. "A-1," "A-2," and "A-3," original petition), with respect to which the instant "claim for refund" (Ex. "C," original petition) purports to be an "amendment," not only add nothing to the legal sufficiency of the "claim for refund" herein, but the same cannot be considered as constituting the "original" claim, not being on the prescribed official Bureau "P. T. Form 79" or containing any of the information called for thereon.

(i) It is therefore apparent on the face of the purported "claim for refund" herein, that the same was not prepared and filed in compliance with the mandatory

and jurisdictional provisions of section 903 of the Revenue Act of 1936, 49 Stat. 1747, as amended by section 405 of the Revenue Act of 1939, 53 Stat. 884 (U. S. C. 1940 ed., title 7, sec. 645), wherein it is provided that such claims shall be filed "in accordance with regulations prescribed by the Commissioner with the approval of the Secretary," and that "All evidence relied upon in support of such claim shall be clearly set forth under oath"; that is to say, the said "claim" was not prepared in accordance with the printed instructions on the official Bureau "P. T. Form 79," and does not "set forth in detail and under oath each ground upon which the refund is claimed," and is not "a true and complete claim" substantiating by "clear and convincing evidence all of the facts necessary to establish" same to the "satisfaction" of the respondent or this Court, as more specifically required by Articles 201 and 202 of Treasury Regulations 96, respectively.

(j) It further affirmatively appears on the face of the purported "claim for refund" that the claimant-petitioner wholly failed to establish before the Commissioner the mandatory and jurisdictional facts required to be so established "to the satisfaction of the Commissioner," as a condition precedent to refund, by the provisions of section 902 of the Revenue Act of 1936, 49 Stat. 1747 (U. S. C. 1940 ed., title 7, sec. 644) and Article 204 of Treasury Regulations 96, promulgated pursuant thereto, in that the claimant submitted no evidence to the respondent in support of its "claim," from which the respondent could legally have determined that the claimant-petitioner bore the burden of any amount allegedly paid by it as processing tax, and that it had not been or might not be relieved thereof, nor reimbursed therefor, and had not shifted such burden, directly or indirectly, through or by any of the means set forth in section 902(a) of the Act, *supra;* or that it had repaid such amount unconditionally to its vendees who bore the burden thereof, as provided in section 902(b) of the Act, *supra,*

2. Even though it should be held for any reason that the purported claim for refund, the disallowance of which is sought to be reviewed herein, was sufficient *in form* to confer jurisdiction in the first instance, which the respondent denies, it still follows that this case should be summarily dismissed for the following additional reasons:

(a) As heretofore pointed out, there were no evidentiary facts submitted in connection with the "claim for refund" from which the Commissioner could have legally determined that the claimant either paid any amount as processing tax or that it bore the burden of any amount so paid.

(b) In view of the foregoing situation, and since the claimant would not be permitted under the law to introduce evidence with respect to any new or additional facts or grounds upon a hearing on the merits herein, it follows that the holding of such a hearing would be a useless procedure.

A brief in support of the foregoing motion, and in further support of the right of the respondent to file same at this time, is being currently submitted herewith, reference to which is respectfully prayed.

WHEREFORE, it is prayed that this motion be granted.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
Raymond F. Brown,
Lloyd C. Hooks,
Special Attorneys,
Bureau of Internal Revenue.

LCH/vd
1/26/43

THE TAX COURT OF THE UNITED STATES

ANGELUS MILLING COMPANY, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 398 P. T. Promulgated May 4, 1943.

PROCESSING TAX—JURISDICTION—INADEQUATE CLAIM.—The Court has no jurisdiction where the claims relied upon fail to set forth any of the information called for by the law, the regulations, and Form P. T. 79.

Prew Savoy, Esq., for the petitioner.
Lloyd C. Hooks, Esq., for the respondent.

OPINION

MURDOCK, *Judge*: The Commissioner filed a motion on January 29, 1943, to dismiss this proceeding on jurisdictional grounds, one of which is that the Court is without jurisdiction since the petitioner has never filed a proper claim for refund. The Commissioner argues that this petitioner has never filed a claim which has adequately set forth the basis upon which a refund could be granted. Several exhibits were introduced, the parties were heard at length, and each submitted a memorandum.

The petitioner was formerly known as Middleport Flour Mills, Inc. It has alleged that it was a processor of wheat during the period from July 9, 1933, to January 6, 1936, and that it paid $145,839.12 in processing taxes on wheat processed by it during that period. Attached to its petition are copies of certain claims for refunds and an amendment to claim marked Exhibits A, B, and C upon which the petitioner relies to show jurisdiction in this Court.

Exhibit C is a copy of an "Amendment to Claim" filed by the petitioner on August 15, 1938, claiming a refund of $145,839.12. It, alone, of the exhibits shows "Angelus Milling

Company" as the name of the claimant. It is on Form P. T. 79, the form provided for a claim for refund of processing taxes. The form includes schedules A to E, inclusive, but those schedules are left blank. Attached to the form, on a separate piece of paper, is certain information purporting to show an allocation of refund due the Niagara Falls Milling Co. and the Angelus Milling Co. by comparing the sales of flour attributable to each. The total processing taxes paid is stated as $434,045.27. The only other information on this form is an affidavit of the president of the petitioner, which is in part as follows:

> The within claim for refund was originally filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc. The name of Middleport Flour Mills Inc. was changed by permission of the Secretary of State of Albany, N. Y. to Middleport Flour Mills Inc.[1] Originally the claim in the name of both Companies was for the sum of $434,045.27.

Exhibit B attached to the petition is an alleged copy of a claim for refund filed by the Niagara Falls Milling Co. on Form P. T. 79, on which the amount claimed is $436,231.73. Information is given in the various schedules on that form. Apparently this claim was filed on June 30, 1937. One of the questions presented here is whether the "Amendment to Claim" filed by the petitioner (Exhibit C) may be regarded as an amendment to the claim filed by the Niagara Falls Milling Co. (Exhibit B). The original claim referred to in Exhibit C is described as having been filed in the name of "Niagara Falls Milling Company and/or Middleport Flour Mills, Inc." on June 22, 1936, claiming a refund of $434,045.27. Obviously the reference could not be to the original of Exhibit B. The name of Middleport Flour Mills, Inc., is nowhere mentioned on Exhibit B, the amount of $434,045.27 does not

[1] The reference to Middleport Flour Mills, Inc., was error. The change in name was to "Angelus Milling Company."

appear on Exhibit B, and the date of filing was about a year after June 22, 1936. Furthermore, it is reasonably clear that the reference in Exhibit C is to the claims represented by Exhibit A.

Copies of three claims are included in Exhibit A. The taxpayer named in each is "Niagara Falls Milling Co., Inc. and/or Middleport Flour Mills, Inc." One is for $57,875.45, another is for $244,895.40, and the third is for $131,274.42. The total of the three claims is $434,045.27. Apparently these claims were filed on or about June 22, 1936. The "Amendment to Claim" (Exhibit C) filed by the petitioner must have been intended as an amendment to the claims represented in Exhibit A. Those original claims were not made on Form P. T. 79, later provided and required by the Commissioner for claims for refund of processing taxes paid under the provisions of the Agricultural Adjustment Act, as amended. Instead, they were filed on an old Form 843, which was intended for a different purpose. The only information given on the claims represented by Exhibit A is a statement of taxes on processing of wheat paid by Niagara Falls Milling Co. for the period from July 31, 1933, to the end of that year, for the year 1934, and for the year 1935. The information required on Form P. T. 79 is not given on those claims.

The Commissioner denied the petitioner's claim for refund in a letter dated May 23, 1941, which was in part as follows:

> Furthermore, your claim does not contain margins computed in accordance with section 907 of the Revenue Act of 1936 and Article 605 of Regulations 96, nor has any other evidence been submitted establishing that you bore the burden of the tax as required by section 902 of the Act and Article 606 of Regulations 96. Hence, you have not filed a true and complete claim in accordance with the requirements of section 903 of the Act and the regulations promulgated pursuant thereto.
>
> Since you did not pay the tax, refund of which is claimed to the Government and you have not filed a true and complete claim in accordance with the requirements of Title VII of the Revenue Act of 1936, your claim is hereby disallowed in full.

Section 903 of the Revenue Act of 1936 provides that no refund shall be allowed of any amount paid under the Agricultural Adjustment Act unless after the enactment of the Revenue Act of 1936 (June 22, 1936) and prior to July 1, 1937, a claim for refund has been filed in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. It further provides that all evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner issued Regulations 86 relating to the above provision. Those regulations provide that claims shall be on the prescribed forms and shall be prepared in accordance with the instructions contained on the forms. Art. 201. They further provide that each claim shall set forth in detail and under oath each ground upon which the refund is claimed. Art. 202. Article 601 of those Regulations provides that claims for refund of amounts paid as processing tax shall be filed on P. T. Form 79. Article 605 requires that there be submitted as a part of each claim a statement showing the average margin for the tax period and for the period before and after the tax. It also requires a detailed showing of the manner in which the margins for each month and the average margin for each period were ascertained, the data and records upon which they were based, the location of such data and records, and all other related matters.

The United States Circuit Court of Appeals for the Eighth Circuit, in discussing claims for refund of processing taxes, said in *Lee Wilson & Co.* v. *Commissioner*, 111 Fed. (2d) 313:

> The function of the facts called for by the schedules is to facilitate research; and the Commissioner was entitled to insist upon compliance with their directions as to the desired information. A claim that refers to no facts upon which it may be founded is ineffective and "will not supply a basis for a suit against the government when there has been neither waiver by the Commissioner nor amendment by the taxpayer."

Numerous cases were cited in support of that statement. The court in that case further held that evidence had to be set forth

in the claim and "A claim that fails to meet the statutory requirements and that has been properly disallowed by the Commissioner as defective leaves the Board without jurisdiction to grant a refund." The same court on a second appeal by the same taxpayer (see *Lee Wilson & Co.* v. *Commissioner*, 123 Fed. (2d) 232) said:

> Since the claim for refund failed to furnish to the respondent a sufficient evidentiary basis for determining the probable merits of the petitioner's asserted claim, we think the Board was without jurisdiction to grant petitioner a refund and did not err in dismissing the petition for review.

See also *Landrum* v. *Commissioner*, 122 Fed. (2d) 857; *Tennessee Consolidated Coal Co.* v. *Commissioner*, 117 Fed. (2d) 452. Cf. *Samara* v. *United States*, 129 Fed. (2d) 594; certiorari denied, — U. S. —.

The "Amendment to Claim" which the petitioner filed on or about August 15, 1938, does not set forth a sufficient evidentiary basis for determining the probable merits of the asserted claim. The petitioner does not argue to the contrary. That "Amendment to Claim" was not an amendment to the claim of "Niagara Falls Milling Co., Inc." represented by Exhibit B.[2] It was obviously intended as an amendment to the claims filed in 1936 under the names of "Niagara Falls Milling Co., Inc., and "Middleport Flour Mills, Inc." The "Amendment to Claim" and those original claims, when read together, do not set forth a sufficient evidentiary basis for determining the probable merits of the asserted claim. Therefore, under the authority of the cases above cited, the claims relied upon by the petitioner are insufficient to give this Court jurisdiction in the proceedings.

The above cases indicate that the Commissioner may waive a defect in a claim, and the petitioner argues that he has waived all defects in its claims by examining the petitioner's

[2] There is no claim or even indication that B was an amendment of A. B is apparently complete within itself. Each was filed within the time allowed by statute for filing original claims.

books and considering its claim on the merits thereof without regard to any technical defects in the form of the claims filed. The petitioner relies upon an affidavit of one of its officers, an accountant, and upon the affidavit of another accountant, as well as upon a letter from a deputy collector, to show that the Commissioner examined the books of the petitioner while considering the claim for refund of the petitioner and before denying that claim. It has not shown, however, that the Commissioner waived any defects in its claim.

The petitioner contends that it was operated so closely with the Niagara Falls Milling Co. that only with care can the affairs of the two be separated. Most of the stock of the two was held by the same stockholders. The officers and directors of the two were the same. Only one set of books was kept for the two and one bank account was maintained. Purchases, processing, and sales were allocated between the two by the officers. It contends, however, that eventually the transactions were charged or credited to separate accounts on the single set of books in such a way that the operations of each could be shown upon the trial of this case if the books were available. The letter from the deputy collector was to Harry Dickinson. He was then the president of the Niagara Falls Milling Co. and also the president of the petitioner. The letter requested permission to examine the books of the petitioner in connection with the investigation of a claim for refund, claim F5899. Claim F5899 was the claim of the Niagara Falls Milling Co., whereas the claim of the petitioner was F10130. Thus, the letter does not support the petitioner's contention that the Commissioner gave consideration to the merits of its own claim. Furthermore, we are told that the books of the petitioner were the same as the books of the Niagara Falls Milling Co. The Commissioner could not investigate the claim of the latter without examining its books, which were likewise the books of the petitioner. The affidavits are not convincing that the Commissioner waived any defects in the claim of this petitioner. There is no allegation in the petitioner's pleadings to the effect that the Commissioner waived defects and investigated the claim on its merits.

On the contrary, the petition assigns as one of the errors the action of the Commissioner "in failing to give consideration to, and the usual hearings on, petitioner's claim." The letter of the Commissioner rejecting the claim of the petitioner indicates on its face that the Commissioner did not waive any defects in the claim. The reasons, and the only reasons, given for rejecting the claim relate to defects therein, one being that the claim did not contain the necessary information and the other that it did not show the tax as paid by the petitioner.

We are unable to hold that the Commissioner has waived defects in the claim. The proceeding must be dismissed for lack of jurisdiction. Discussion of the other ground advanced by the respondent is unnecessary.

(The Tax Court of
SEAL
the United States)

THE TAX COURT OF THE UNITED STATES
WASHINGTON

ANGELUS MILLING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 398 P.T.

ORDER OF DISMISSAL

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated May 4, 1943, it is

ORDERED: That this proceeding is dismissed for lack of jurisdiction.

Enter:

ENTERED MAY 4, 1943

(s) J. E. MURDOCK,
Judge.

The Tax Court
of the United States
FILED.
July 27, 1943
Enr.
Dkt.
Cal.
Stat.

PETITION FOR REVIEW

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ANGELUS MILLING COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. P. T. 398

PETITION OF ANGELUS MILLING COMPANY FOR A REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Now comes Angelus Milling Company, by its President, Raymond A. O'Connor, and complaining that it has been aggrieved by the decision of The Tax Court of the United States,

rendered against it May 4, 1943, in the case of the appeal of said petitioner against the Commissioner of Internal Revenue, Docket No. P. T. 398, and desiring a review thereof by the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

I.

Nature of the Controversy

Petitioner is a corporation organized and existing under the laws of the State of New York, with its principal office at Niagara Falls, New York. On June 13, 1933, the name of Petitioner was changed from "Middleport Flour Mills, Inc." to "Angelus Milling Company, Inc.". Since that date, Petitioner has been known as "Angelus Milling Company", and "Middleport Flour Mills", the name "Angelus" connoting the brand of flour, and the name "Middleport" designating the locale of one of the flour mills.

During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner was a processor of wheat.

Niagara Falls Milling Co., Inc., hereinafter called "Niagara", is a corporation organized and existing under the laws of the State of New York. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Niagara was a processor of wheat.

For the period July 9, 1933, to January 31, 1935, joint returns, on account of the processing of wheat by Petitioner and Niagara, were filed with the Collector of Internal Revenue for the 28th District of New York, and tax in the sum of $324,016.25, was paid him on account of such processings.

For the period February 1, 1935, to November 30, 1935, returns were filed, in the name of Niagara, on account of the processings of wheat by Petitioner and Niagara, with the Collector of Internal Revenue for the 28th District of New York, and tax, in the sum of $110,029.02, was paid him on account of such processings.

Of the aforesaid sums paid as processing tax on wheat, the following amounts were paid said Collector, on the dates below set forth, on account of the processings of Petitioner listed below, out of monies belonging to Petitioner:

Date	*Units Processed*	*Tax Paid*
1933		
July		
August	19,505	$862.02
September	20,619	3,489.05
October	24,368	5,447.69
November	21,728	6,185.57
December	26,067	7,728.11
1934		
January-February	63,797	15,991.82
March	18,471	9,933.35
April-May	52,888	16,866.78
June	28,144	8,662.05
July	21,920	8,866.82
August	35,475	8,696.02
September	27,674	8,947.71
October	27,438	9,140.43
November	22,459	9,078.89
December	35,091	7,585.26
1935		
January-February	44,248	13,862.57
March-April	47,597	13,864.29
May	39,009	9,549.69
June	21,237	6,279.70
July	21,143	5,563.14
August	24,998	4,034.66
September	32,852	5,274.70
October	30,187	840.67
	706,906	$186,751.99

On or about June 23, 1936, claims were filed on Form 843 by "Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc." with the Collector of Internal Revenue for the 28th District of New York for the refund of processing taxes on

wheat paid by Petitioner and Niagara, in the total sum of $454,045.27 (Exhibits A-1, A-2 and A-3, attached to the Petition), paid to him on account of the processing of wheat by them.

On or about June 30, 1937, Niagara filed a claim for the refund of processing tax on wheat, in the sum of $436,231.73, with the Collector of Internal Revenue for the 28th District of New York, paid to him on account of the processing of wheat by it and by Petitioner. (Exhibit B attached to the Petition).

On or about August 15, 1938, Petitioner filed a claim for the refund of $145,839.12, paid out of its monies, on account of the processing of wheat by it, with the Collector of Internal Revenue for the 28th District of New York, designating this claim as "Amendment to Claim". (Exhibit C attached to Petition).

Under date of November 18, 1938, the Internal Revenue Agent in Charge of the Internal Revenue Service at Buffalo, New York, in connection with the investigation of the claim of Niagara, sent to Mr. Harry Dickinson, the President of both Petitioner and Niagara, the following letter:

> "In connection with the investigation of Claim for refund under Title VII, Revenue Act of 1936—Claim F5899, you are requested to allow examination of the following records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc.:
>
> General Ledgers of both corporations for the years 1935 and 1936
> Minute Books of both corporations
>
> "In view of the fact that the investigation will be completed within the next few days I would request that these records be made available to me on Monday, November 21, at Room 1011, White Building, Buffalo, N. Y.
>
> Respectfully,
>
> J. BERNARD LIEBEN,
> *General Deputy Collector*"

JBL:E

On or about September 4, 5, 6 and 7, 1940, the aforesaid J. Bernard Lieber, Deputy Collector of Internal Revenue, and other representatives of Respondent, conferred with the accountant for Petitioner, respecting Petitioner's claim for refund, fully investigating said claim, and at such conferences supplied Petitioner with all of the basic data and figures, taken from the books of it and Niagara, from which the data required in a complete claim would ordinarily and necessarily be taken.

Under date of May 24, 1941, the Commissioner of Internal Revenue, without having at any time requested from Petitioner any additional information, in view of the complete information in his possession, and without the usual conferences in Washington, in a letter sent by registered mail, disallowed the claim for refund of Petitioner filed August 15, 1938, in its entirety (Exhibit D attached to Petition), relying on a technicality, and *for the first time complaining of the incompleteness of the claim for refund.* On that date, *the books* of Petitioner and of Niagara were involved in bankruptcy proceedings involving Niagara and were unavailable to Petitioner or its Counsel, but were available to the Commissioner.

Under date of August 20, 1941, Petitioner filed a Petition with the United States Processing Tax Board of Review, for a review of the disallowance by the Commissioner of Petitioner's claim for refund. At that time, the Assistant Chief Counsel of the Treasury Department, Bureau of Internal Revenue, was refusing to allow Petitioner, or its Counsel, to examine the processing tax returns of Petitioner and Niagara, *for the reason that they were in the file of Niagara* and not Petitioner.

Under date of October 4, 1941, Respondent filed a "Motion for Better Statement of Claim".

Counsel for Petitioner, having finally been given copies of the processing tax returns of Petitioner and Niagara, taken from the files of Niagara, on November 21, 1941, filed an "Amendment to Petition in Response to Motion for Better Statement of Claim".

On November 26, 1941, Respondent filed a "Renewal of Motion for Better Statement of Nature of Claim to Apply to Petition as Amended".

Argument was heard on December 19, 1941, the said motion was denied and Petitioner was allowed to file an Amended Petition, which was filed December 29, 1941.

On February 16, 1942, Respondent filed a "Motion to Dismiss" with the United States Processing Tax Board of Review. Argument was heard, and this motion was summarily denied on August 5, 1942.

On August 21, 1942, Respondent filed his Answer.

On October 22, 1942, the case was set for hearing on the merits by the United States Processing Tax Board of Review on February 8, 1943.

On October 21, 1942, the Revenue Act of 1942 became law, pursuant to Section 510 of which The Tax Court of the United States was given jurisdiction of cases then pending before the United States Processing Tax Board of Review, the life of which said Board was terminated as of December 31, 1942. Accordingly, the hearing on the merits in this case was not had by said Board.

On January 29, 1943, Respondent filed a "Motion to Dismiss on Jurisdictional Grounds" with The Tax Court of the United States.

After argument, the said Motion was granted, on May 4, 1943.

II.

Decision to be Reviewed

The Tax Court of the United States, on May 4, 1943, promulgated its opinion that it has no jurisdiction to review the disallowance by the Commissioner of the claim for refund filed by Petitioner.

Pursuant thereto, the Court, on May 4, 1943, entered its Order that "the proceeding is dismissed for lack of jurisdiction".

III.

Court in Which Review is Sought

The said Petitioner being aggrieved by the conclusions of law contained in said decision and order desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit.

Wherefore, it petitions that a transcript of record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Second Circuit, and transmitted to the said Court for filing and appropriate action, to the end that the errors complained of may be reviewed and corrected by said Court.

IV.

Facts Necessary to Establish Jurisdiction

Petitioner, a New York Corporation, during the years 1933 to 1936, had, and now has, its principal office at Niagara Falls, New York, and filed processing tax returns with, paid processing taxes to, and filed claims for the refund of such processing taxes with, the Collector of Internal Revenue for the 28th District of New York, at Buffalo, New York, in accordance with the Agricultural Adjustment Act of May 12, 1933, as amended, and pertinent regulations, and with the Revenue Acts of 1932, 1934, 1936 and 1939, as amended. The Respondent is the duly appointed qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States.

The claim was filed August 15, 1938, the final date for filing being December 31, 1939, under the Revenue Act of 1939. The notice of the disallowance of the claim was sent by registered mail to Petitioner at Niagara Falls, New York, under date of May 24, 1941. The Petition was filed with the United States Processing Tax Board of Review on August 20, 1941, and an Amended Petition was filed December 29, 1941. The Petition and Claim for Refund was dismissed by The Tax Court of the United States on May 4, 1943.

ASSIGNMENTS OF ERROR

1. The Court erred in not accepting as true the uncontroverted facts set forth in the affidavits filed in opposition to the "Motion to Dismiss on Jurisdictional Grounds", which facts support the Court's jurisdiction of the review of the Commissioner's disallowance of the claim for refund.

2. The Court erred in not holding that the Commissioner has waived any insufficiency in the claim for refund and that it has jurisdiction to review his disallowance thereof.

3. The Court erred in holding that it has no jurisdiction to review the disallowance of the claim for refund.

4. The Court erred in failing and refusing to hold a hearing on the merits of the claim for refund.

(Signed) R. A. O'CONNOR,
President

(Signed) PREW SAVOY,
Attorney for Petitioner.

VERIFICATION

RAYMOND A. O'CONNOR, being duly sworn, says that he is the President of Petitioner, and as such, is duly authorized to verify the foregoing petition for review, by the United States Circuit Court of Appeals for the Second Circuit, of the decision in the above entitled case.

That he has read said petition and knows the contents thereof, and that the facts stated therein are true except such facts as may be stated on information and belief, and those facts he believes to be true.

(Signed) RAYMOND O'CONNOR.

SUBSCRIBED and SWORN to before me this 14th day of July, 1943.

(Signed) JOHN D. MAHONEY,
Notary Public.

My Commission expires March 31, 1945.

The Tax Court
of the United States
FILED
July 27, 1943
Enr.
Dkt.
Cal.
Stat.

IN THE TAX COURT OF THE UNITED STATES

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. P. T. 398

NOTICE OF FILING OF PETITION FOR REVIEW

To J. P. Wenchel, Esq.,
Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.

You are hereby notified that Angelus Milling Company did, on the 27th day of July, 1943, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review, by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the said The Tax Court of the United States heretofore rendered in the above-entitled case. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated at Washington, D. C., this 27th day of July, 1943.

(Signed) PREW SAVOY.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of er-

rors mentioned herein, is hereby acknowledged this 27th day of July, 1943.

J. P. WENCHEL,
Attorney for Respondent.

The Tax Court
of the United States
LODGED
Sept. 16, 1943
Dkt. .....
Cal. .....
Stat. .....

The Tax Court
of the United States
FILED
Sept. 22, 1943
Enr. .....
Dkt. .....
Cal. .....
Stat. .....

IN THE TAX COURT OF THE UNITED STATES

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. P. T. 398

STATEMENT OF EVIDENCE

The above case came on for hearing before the Honorable Percy S. Crewe, Member of the United States Processing Tax Board of Review, upon Respondent's Motion for Better Statement of Claim, filed October 4, 1941, and renewed November 26, 1941, which said Motion was denied January 20, 1942; upon Respondent's Motion to Dismiss, filed February 16, 1942, before the Honorable John W. Edwards, Member of said Board, which said Motion was denied August 5, 1942; and before the Honorable J. E. Murdock, Judge of The Tax Court of the United States, upon Respondent's Motion to Dismiss on Jurisdictional grounds, filed January 29, 1943, which mo-

tion was granted on May 4, 1943; there being present the Petitioner and Respondent by their respective counsel.

No testimony was heard. In addition to the Exhibits attached to the Pleadings, all of the Exhibits material and necessary in the opinion of Petitioner to the determination of the assignments of error set out by Petitioner in its Petition for Review by this Court of the decision of The Tax Court of the United States, to be attached hereto and made a part of this Statement of Evidence, are:

Exhibits filed by the Petitioner with the United States Processing Tax Board of Review:

1. Monthly Return of Processor of Wheat, P. T., Form 1, filed by Niagara Falls Milling Co. and Angelus Milling Company, Inc., on August 25, 1933, on account of processings of wheat in the month of July, 1933, in the mill at *Lockport*, New York, with the Collector of Internal Revenue for the 28th New York District.

The returns on account of such processings, at Lockport, New York, for August, 1933, filed September 30, 1933; for September, 1933, filed October 31, 1933; for October, 1933, filed December 1, 1933; for November, 1933, filed January 2, 1934; for December, 1933, filed January 31, 1934; for January, 1934, filed February 28, 1934; for February, 1934, filed March 31, 1934; for March, 1934, filed April 30, 1934; for April, 1934, filed May 31, 1934; for May, 1934, filed June 30, 1934; for June, 1934, filed July 31, 1934; for July, 1934, filed August 31, 1934; for August, 1934, filed September 29, 1934; for September, 1934, filed October 31, 1934; for October, 1934, filed November 30, 1934; for November, 1934, filed December 31, 1934; for December, 1934, filed January 31, 1935; and for January, 1935, filed February 28, 1935 (except as to the number of bushels of wheat processed and the amount of tax) are in substance the same as the aforesaid return filed August 25, 1933, and therefore are not reproduced in this record.

2. Monthly Return of Processor of Wheat, P. T. Form 1, filed by Niagara Falls Milling Co., on April 1, 1935, on ac-

count of processings of wheat in the month of February, 1935, in the mill at *Lockport*, New York, with the Collector of Internal Revenue for the 28th New York District.

The returns on account of such processings, at Lockport, New York, for March, 1935, filed April 30, 1935; for April, 1935, filed May 31, 1935; for May, 1935, filed July 1, 1935; for June, 1935, filed July 31, 1935; for July 1935, filed August 31, 1935; for August, 1935, filed September 30, 1935; for September, 1935, filed October 31, 1935; for October, 1935, filed November 30, 1935; and for November, 1935, filed December 31, 1935 (except as to the number of bushels of wheat processed and the amount of tax) are in substance the same as the aforesaid return filed April 1, 1935, and therefore are not reproduced in this record.

3. Monthly Return of Processor of Wheat, P. T. Form 1, filed by Niagara Falls Milling Co., on April 1, 1935, on account of processings of wheat in the month of February, 1935, in the mill at *Middleport*, New York, with the Collector of Internal Revenue for the 28th New York District.

The returns on account of such processings, at Middleport, New York, for March, 1935, filed April 30, 1935; for April, 1935, filed May 31, 1935; for May, 1935, filed July 1, 1935; for June, 1935, filed July 31, 1935; for July, 1935, filed August 31, 1935; for August, 1935, filed September 30, 1935; for September, 1935, filed October 31, 1935; for October, 1935, filed November 30, 1935; and for November, 1935, filed December 31, 1935 (except as to the number of bushels of wheat processed and the amount of tax) are in substance the same as the aforesaid return filed April 1, 1935, and for that reason are not being reproduced in this record.

Exhibits filed by the Petitioner with The Tax Court of the United States:

4. Letter of November 18, 1938, from J. Bernard Lieben, General Deputy Collector in the 28th New York District, addressed to Mr. Harry Dickinson, Lockport, New York.

5. Affidavit of Jackson A. Lyon, dated February 8, 1943.

6. Affidavit of Raymond A. O'Connor, dated February 8, 1943.

The Petitioner, by its attorney, Prew Savoy, tenders and presents the foregoing as a Statement of Evidence and exhibits in this case and prays that the same be approved by The Tax Court of the United States and made a part of the Record in this cause.

(Signed) PREW SAVOY,
Attorney for Petitioner.

No objections for the purpose of the record on this appeal.

(S) J. P. WENCHEL,
RFD.

APPROVED AND ORDERED FILED this 22nd day of Sept., 1943.

J. E. MURDOCK,
Judge.

U. S. PROCESSING TAX BOARD OF REVIEW DKT. NO. 398, P.T. IN EVIDENCE FOR PETITIONER EXHIBIT #1. JUNE 4, 1942.

P. T. Form 1
Int. Rev. Service

MONTHLY RETURN OF PROCESSOR OF WHEAT
To be executed and filed in duplicate with Collector for district.

RETURN RECEIVED AUG 25 1933 28TH NEW YORK

Name of Processor: NIAGARA FALLS MILLING CO. ANCHUS MILLING COMPANY, INC. Dist.

Principal Office: Lockport, New York Month of: July

Location of Processing Plant: Lockport, New York Aug. 24 1933

Return of all wheat on hand, received, disposed of, and in process, products therefrom, and tax due thereon, processing for the producer and for export. Also wheat delivered to producers and removed for export without the payment of tax, and the amount of tax due by the processor named for the month specified.

1. Wheat in process during month: Pounds 3,290,720

Articles	(f) Processed	(g) Delivered to producer*	(h) Removed for export
2. Flour	Pounds	Pounds	Pounds
(a) Whole wheat and graham	30,882		
(b) Other than whole wheat and graham	1,259,020		
(c) Semolina and farina			
Cereal Preparations			
(d) Whole wheat type, chiefly of whole wheat			
(e) Other except those chiefly of bran			
3. Yield Bushels per barrel	4.86 Clean		
4. Less wheat processed for producers & for export			

5. Net taxable processed wheat (item 1 less 4)	3,290,720
6. Bushels of wheat processed (item 5 ÷ 60)	48,012
7. Rate of tax per bushel of wheat of 60 pounds processed	$0.30
8. Amount of tax	$13,503.60
9. Credit (if any) per claim attached	
10. Total tax due	$13,503.60

I swear (or affirm) that this return is a true and correct statement of all wheat received, disposed of, put in process, and on hand at the beginning, and at the end of the month, and screenings received during the month; of the quantities of wheat processed for, and products therefrom, delivered to producers, and removed for export, and of the amount of tax due by the processor named for the month specified.

Sworn to and subscribed before me this 24th day of August 1933

C. Lee Chamberlain - Notary Public
(Name or witness) (Title or witness)

Signed: W. Kelsman Secy
(State whether owner of business, member of firm, or if officer of corporation, or duly authorized manager or agent, give title)

*Entries in this column must be supported by one copy of each producer's affidavit or certificate, which must be attached to this return.

See also instructions on back.

(over) Aff. for Extension of time for 90 days for payment

ACCOUNT OF WHEAT

	Wheat	
	Total Bushels	Total Pounds
On hand, beginning of month	55,004	1,980,040
Received during month	50,700	3,042,540
Totals	85,795	5,087,580
Shipped or delivered during month	[illegible]	[illegible]
Ground not in form of flour, for feed during month	[illegible]	[illegible]
Destroyed, or otherwise disposed of during month	None	[illegible]
On hand, end of month	38,697	1,315,698
Put in process during month	45,018	2,700,780
To balance (analyze below)	144	8,640
Totals	83,795	5,087,580
Screenings received during month	2,756-1/3	184,102

Analysis:

Loss in Milling

INSTRUCTIONS

(see also Regulations 81 and Treasury Decision 4371)

1. Law.- Pursuant to the provisions of the Agricultural Adjustment Act, by proclamation of the Secretary of Agriculture, and regulations established by him with the approval of the President, a processing tax of 30 cents per bushel of wheat of 60 pounds put in process became effective from the first moment of July 9, 1933. Article 2(h)(1) of Regulations 81 defines processing; Article 2(a)(1) relates to processing for producer (see also Art. 2(c) of T.D. 4371), Articles 27 and 28 to Existing Contracts, and Article 31 to Credit and Refund.

2. Returns and Payment of Tax.- All taxes are due and payable without any assessment by the Commissioner or notice from the collector. Return, with remittance, covering taxes due for any month, must be in the hands of the collector of internal revenue (or his authorized representative) of the district in which the principal place of business of the person making the return is located (or if he has no principal place of business in the United States, to the Collector at Baltimore, Maryland) on or before the last day of the succeeding month; however, the Commissioner has authority under the Law to require the immediate filing of a return and payment of the tax, when such action becomes necessary. In regard to postponement of payment of the tax, see article 26(a), Regulations 81. Returns must be signed and sworn to before an officer authorized to administer oaths generally and under seal, or before a deputy collector of internal revenue or rever agent. If the total amount of tax shown by a return to be due is $10 or less, the return may be acknowledged before two subscribing witnesses in lieu of an oath.

3. Records.- Each person required to file a return on this form and pay tax shall preserve for a period of at least 4 years from the date when the tax became due accurate records and accounts of all transactions involving the processing of wheat and products thereof and of all transactions involved in any way in any claim for refund, for abatement or for credit. In case of processing exempt from tax, the records shall be kept for a period of at least a year from the last day of the month in which the wheat was processed. These records and accounts shall be kept on file at his principal office or at some other accessible and safe location. He shall also retain a copy of the return on the premises. The books, papers, and documents referred to shall be open for inspection, during usual business hours, by any internal revenue officer. Such records shall contain sufficient information to enable the Commissioner to determine whether the correct amount of tax has been paid. See also Article 19, Regulations 81.

4. Penalties.- Failure to file on time, 25 per cent of tax. Failure to pay tax when due before assessment, interest at the rate of 1 per cent a month. Failure to pay within 10 days after issuance of notice and demand based on assessment approved by the Commissioner, 5 per cent penalty and 1 per cent interest a month on assessment. Severe penalties for willful failure to collect tax, pay tax, keep records, file returns, or for false or fraudulent return, are imposed by law.

Return
Received
Sept. 30, 1933
28th
New York

P. T. Form 1
Treasury Dept.
Int.Rev.Service

MONTHLY RETURN OF PROCESSING OF WHEAT
To be executed in triplicate in accordance with

Name of Processor: NIAGARA FALLS MILLING CO.
AMOSKEAG MILLING COMPANY, INC.

Principal Office: Lockport, New York Month of August,

Location of Processing Plant: Lockport, N. Y. Sept. 18, 1933

I hereby report all wheat on hand, received, started in process, produced (including the final domestic processing thereof, processing for the producer and for export), products delivered to producers and removed for export with the payment of the tax, and the amount of tax due, by the processor named for the month specified.

1. Wheat put in process during month: 2,000,000

Articles	Produced	Delivered to producers	Removed for export Barrels
2. Flour			
a) Whole wheat and graham	IV,[illegible]		
b) Other than whole wheat and graham	2,[illegible]		
c) Semolina and farina			
Cereal Preparations			
d) Whole wheat type, chiefly of whole wheat			
e) Other cereal types chiefly of wheat			
3. TOTAL	[illegible]		

4. Less wheat processed for producers & for export: [illegible]
5. Net taxable processed wheat (item 3 less 4): [illegible]
6. Bushels of wheat processed (item 5 ÷ 60): [illegible]
7. Rate of tax per bushel of wheat of 60 pounds processed: [illegible]
8. Amount of tax: $16,[illegible].00
9. Credit (if any) per statement attached:
10. Total tax due:

I swear (or affirm) that this return is a true and correct statement of all wheat received, disposed of, in process, on hand at the beginning, and at the end of the month and the quantities received during the month, of the quantities of wheat processed for, and removed therefrom, delivered to producers, and removed for export, and of the amount of tax due by the processor named, for the month specified.

Sworn to and subscribed before me this [illegible] day of [illegible], 193[illegible]

Signed: [illegible]

(State whether owner of business, member of firm, or if officer of corporation, or if duly authorized manager or agent, give title)

(Name or witness) (Title or witness)

*Entries in this column must be supported by the copy of each producer's affidavit or certificate, which must be attached to this return.

(over)

PRINT IS BAD

[illegible] OF WHEAT

at

	Total Pounds	Total Pounds
On hand, beginning of month	[illegible]	[illegible]
Received during month	[illegible]	[illegible]
Totals	[illegible]	[illegible]
Shipped or delivered during month		
Ground not in form of flour, for feed during month		
Destroyed, or otherwise disposed of during month		
On hand, end of month	[illegible]	[illegible]
Put in process during month	[illegible]	[illegible]
To balance (analyse below)		
Totals	[illegible]	[illegible]
[illegible] received during month	[illegible]	[illegible]

Loss in Milling

INSTRUCTIONS

(See also Regulations 81 and Treasury Decision 4371)

1. Law.- Pursuant to the provisions of the Agricultural Adjustment Act, by proclamation of the Secretary of Agriculture, and regulations established by him with the approval of the President, a processing tax of 30 cents per bushel of wheat of 60 pounds put in process became effective from the first moment of July 9, 1933. Article 2(h)(1) of Regulations 81 defines processing; Article 9(a)(1) relates to processing for producer (see also Art. 2(c) of T.D. 4371), Articles 27 and 28 to Existing Contracts, and Article 38 to Credit and Refund.

2. Returns and Payment of Tax.- All taxes are due and payable without any assessment by the Commissioner or notice from the collector. Return, with remittance, covering taxable [illegible] any month, must be in the hands of the collector of internal revenue (or [illegible] and representative) of the district in which the principal place of business of the person making the return is located (or if he has no principal place of business in the United States, to the Collector at Baltimore, Maryland) on or before the last day of the succeeding month. However, the Commissioner has authority under the law to require the immediate filing of a return and payment of the tax, when such action becomes necessary. In regard to postponement of payment of the tax, see Article 26(c), Regulations 81. Returns must be signed and sworn to before an officer authorized to administer oaths generally and under seal, or before a deputy collector of internal revenue or revenue agent. If the taxable amount of tax shown by a return to be due is $10 or less, the return may be acknowledged before two subscribing witnesses in lieu of an oath.

3. Records.- Each person required to file a return on this form and pay tax shall preserve for a period of at least 4 years from the date when the tax became due accurate records and accounts of all transactions involving the processing of wheat, and products thereof and of all transactions involved in any way in any claim for refund, for abatement or for credit. In case of processing exempt from tax, the records shall be kept for a period of at least a year from the last day of the month in which the wheat was processed. These records and accounts shall be kept on file at his principal office or at some other accessible and safe location. He shall also retain a copy of the return on the premises. The books, papers, and documents referred to shall be open for inspection, during usual business hours, by any internal revenue officer. Such records shall contain sufficient information to enable the Commissioner to determine whether the correct amount of tax has been paid. See also Article 10, Regulations 81.

4. Penalties.- Failure to file on time, 25 per cent of tax. Failure to pay on time before assessment, interest at the rate of 1 per cent a month. Failure to pay within 10 days after issuance of notice and demand based on assessment approved by the Commissioner, 5 per cent penalty and 1 per cent interest a month on assessment. Severe penalties for willful failure to collect tax, pay tax, keep records, file returns, or for false or fraudulent return, are imposed by law.

PRINT IS BAD

P.T. Form 1
TREASURY DEPARTMENT
Internal Revenue Service

RETURN RECEIVED
OCT 31 1935
28TH
NEW YORK

MONTHLY RETURN OF PROCESSOR OF WHEAT

To be executed and filed in duplicate with collector for district

NIAGARA FALLS MILLING CO.

Name of processor ARCHLOS MILLING COMPANY, INC. District

Principal office Lockport, N. Y. Month of September

Location of processing plant Lockport, N. Y. October 30, 1935

Return of all wheat on hand, received, disposed of, and put in process; production from the first domestic processing thereof; processing for the producer and for export; products delivered to producers and removed for export without the payment of tax, and the amount of tax due, by the processor named, for the month specified.

		(1) Processed	(2) Deductions by Processor*	(3) Returned per Schedule	
1	Wheat put in process during month				Pounds 3,018,000
2	STOCKS:	Pounds	Pounds	Pounds	
	(a) Whole wheat and graham, etc.	97,618			
	(b) Other than whole wheat and graham	2,278,584			
	(c) Semolina and farina				
	CEREAL PREPARATIONS:				
	(d) Whole wheat type, chiefly of whole wheat				
	(e) Other, except those chiefly of bran				
3	Yield bushels per barrel				
4	Less wheat processed for producers and for export				
5	Net taxable processed wheat (item 1 less 4)				3,018,000
6	Bushels of wheat processed (item 5 ÷ 60)				50,300
	Rate of tax per bushel of wheat of 60 pounds processed				$0.30
8	Amount of tax				$15,090.00
9	Credit (if any) per claim attached				
10	TOTAL TAX DUE				$15,090.00

I swear (or affirm) that this return is a true and correct statement of all wheat received, disposed of, put in process and on hand at the beginning and at the end of the month, and all gainings received during the month, of the quantities of wheat processed for, and products therefrom, delivered to producers, and removed for export, and of the amount of tax due by the processor named for the month specified.

Sworn to and subscribed before me this 30th day of October, 1935

Chas. F. Luckmann Jr. - Notary Public
(Name of officer)

Signed [signature]
(Name of corporation, partnership, or individual)

* Entries in this column must be supported by one copy of each producer's affidavit or certificate, which must be attached to this return the date of acquisition or both.

(over) 1-0/-00

Pick up & retain for payment of tax

ACCOUNT OF WHEAT

	WHEAT	
	Bus.	Bus.
On hand, beginning of month	38,030	2,281,800
Received during month	52,366	3,141,960
Totals	90,396	5,423,760
Shipped or delivered during month		
Ground not in form of flour, for feed during month		
Destroyed, or otherwise disposed of during month		
On hand, end of month	39,943	2,396,580
Put in process during month	50,250	3,015,000
To balance (analyze below)	203	12,180
Totals	90,396	5,423,760
Screenings received during month	1817.4	109,044

Analysis ..... Loss in Milling.

INSTRUCTIONS

(See also regulations 91 and Treasury Decision 4271)

1. **Law.**—Pursuant to the provisions of the Agricultural Adjustment Act, by proclamation of the Secretary of Agriculture, and regulations established by him with the approval of the President, a processing tax of 30 cents per bushel of wheat, if no penalty put in process thereof, became effective from the first moment of June 9, 1933. (See article 6 (b) of regulations 91 as to processing, article 9 (a) relative to processing for producer use, also art. 4(a) of T.D. 4327; articles 2 and 24 to existing contracts, and article 31 to credit and refund.

2. **Returns and Payment of Tax.**—All taxes are due and payable without any assessment by the Commissioner or notice from the collector. Returns, with remittance, covering taxes due for any month, must be in the hands of the collector of internal revenue (or his authorized representative) of the district in which the principal place of business of the person making the return is located (or he has no principal place of business in the United States, to the collector at Baltimore, Md.) on or before the last day of the succeeding month. However, the Commissioner has authority under the law to require the immediate filing of a return and payment of the tax, when such action becomes necessary. In regard to postponements of payment of the tax, see article 26 (c) regulations 91. Returns must be signed and sworn to before an officer authorized to administer oaths generally and under seal, or before a deputy collector of internal revenue or revenue agent. If the total amount of tax shown by a return to be due is $10 or less, the return may be acknowledged before two subscribing witnesses in lieu of an oath.

3. **Records.**—Each person required to file a return on this form and pay tax shall preserve for a period of at least 4 years from the date when the tax became due accurate records and accounts of all transactions involving the processing of wheat and products thereof and of all transactions involved in any way in any claim for refund, for abatement, or for credit. In case of processing exempt from tax, the records shall be kept for a period of at least a year from the last day of the month in which the wheat was processed. These records and accounts shall be kept on file at his principal office or at some other convenient and safe location. He shall also retain a copy of the return on the premises. The books, papers, and documents referred to shall be open for inspection, during usual business hours, by any internal revenue officer. Such records shall contain sufficient information to enable the Commissioner to determine whether the correct amount of tax has been paid. (See also article 10, regulations 91.)

4. **Penalties.**—Failure to file on time 25 percent of tax. Failure to pay on time before assessment, interest at the rate of 1 percent a month. Failure to pay within 10 days after number of notice and demand based on assessment made by the Commissioner 5 percent penalty and 1 percent interest a month on assessment. Severe penalties for willful failure to collect tax, pay tax, keep records, file returns, or for false or fraudulent return, are imposed by law.

C.2

PRINT IS BAD

P.T. Form 1
TREASURY DEPARTMENT
Internal Revenue Service

RETURNS RECEIVED
DEC 1 1933
BUFFALO
NEW YORK

MONTHLY RETURN OF PROCESSOR OF WHEAT

To be executed and filed in duplicate with collector for district

Name of processor: Niagara Falls Milling Co., Angelus Milling Co., Inc. District

Principal office: Lockport, N. Y. Month of: October

Location of processing plant: Lockport, N. Y. Nov. 22 1933

Return of all wheat on hand, received, disposed of, and put in process; production from the first domestic processing thereof; processing for the producer and for export; products delivered to producers and removed for export without the payment of tax, and the amount of tax due, by the processor named, for the month specified.

1 Wheat put in process during month: Pounds 3,243,280

2. ARTICLES	(1) PROCESSED	(2) DELIVERED TO PRODUCER	(3) REMOVED FOR EXPORT
	Pounds	Pounds	Pounds
FLOUR			
(a) Whole wheat and graham	47,824		
(b) Other than whole wheat and graham	3,681,280		
(c) Semolina and farina			
CEREAL PREPARATIONS			
(d) Whole wheat type, chiefly of whole wheat			
(e) Other, except those chiefly of bran			

3. Yield ..... bushels per barrel
4 Less wheat processed for producers and for export

5 Net taxable processed wheat (item 1 less 4) 3,243,280
6 Bushels of wheat processed (item 5 ÷ 60) 54,388
Rate of tax per bushel of wheat of 60 pounds processed $0.30
8 Amount of tax 17,816.40
9 Credit (if any) per claim attached
10 TOTAL TAX DUE

I swear (or affirm) that this return is a true and correct statement of all wheat received, disposed of, put in process, and on hand at the beginning and at the end of the month, and screenings received during the month, of the quantities of wheat processed for, and products therefrom, delivered to producers, and removed for export, and of the amount of tax due by the processor named for the month specified.

Sworn to and subscribed before me this 24th day of November 1933

Signed: J. Schuman Secy

Notary Public

(OVER)

STAT

B-1

ACCOUNT OF WHEAT

	WHEAT	
	Total Bushels	Total Pounds
On hand, beginning of month	38,943	2,398,500
Received during month	64,139	3,966,500
Totals	106,082	6,364,920
Shipped or delivered during month		
Ground not in form of flour, for feed during month		
Destroyed, or otherwise disposed of during month		
On hand, end of month	42,562	2,550,120
Put in process during month	59,358	3,813,800
To balance (analyze below)	4,162	931,000
Totals	106,082	6,364,920
Screenings received during month	4,642	278,520
Analysis		

INSTRUCTIONS

(See also regulations 81 and Treasury Decision 4371)

1. **Law.**—Pursuant to the provisions of the Agricultural Adjustment Act, by proclamation of the Secretary of Agriculture, and regulations established by him with the approval of the President, a processing tax of 30 cents per bushel of wheat of 60 pounds net is process became effective from the first moment of July 9, 1933. Article 2(a)(1) of regulations of defines processing; article 9(a) (1) relates to processing for producer (see also art. 2(c) of T.D. 4371), articles 37 and 38 to existing contracts, and article 11 to credit and refund.

2. **Returns and Payment of Tax.**—All taxes are due and payable without any assessment by the Commissioner or notice from collector. Return, with remittance, covering taxes due for any month, must be in the hands of the collector of internal revenue (or an authorized representative) of the district in which the principal place of business of the person making the return is located (or if he has no principal place of business in the United States, to the collector at Baltimore, Md.) on or before the last day of the succeeding month; however, the Commissioner has authority under the law to require the immediate filing of a return and payment of the tax, when such action becomes necessary. In regard to postponement of payment of the tax, see article 28 (c), regulations 81. Returns must be signed and sworn to before an officer authorized to administer oaths generally and under seal, or before a deputy collector of internal revenue or revenue agent. If the total amount of tax shown by a return to be due is $10 or less, the return may be acknowledged before two citizens witnesses in lieu of an oath.

3. **Records.**—Each person required to file a return on this form and pay tax shall preserve for a period of at least 4 years from the date when the tax became due accurate records and accounts of all transactions involving the processing of wheat, and products thereof and of all transactions involved in any way in and claims for refund, for abatements, or for credits. In case of proceedings exempt from tax, the records shall be kept for a period of at least a year from the last day of the month in which the wheat was processed. These records and accounts shall be kept on file at his principal office or at some other accessible and safe location. He shall also retain a copy of the return on the premises. The books, papers, and documents referred to shall be open for inspection during usual business hours, by any internal revenue officer. Such records shall contain sufficient information to enable the Commissioner to determine whether the correct amount of tax has been paid. (See also article 10, regulations 81.)

4. **Penalties.**—Failure to file on time, 25 percent of tax. Failure to pay on time before assessment, interest at the rate of 1 percent a month. Failure to pay within 10 days after issuance of notice and demand for assessment approved by the Commissioner, 5 percent penalty and 1 percent interest a month on assessment. Severe penalties for willful failure to collect tax, pay tax, keep records, file returns, or for false or fraudulent return, are imposed by law.

PRINT IS BAD

P. T. Form 4
TREASURY DEPARTMENT
Internal Revenue Service
Revised August 1936

MONTHLY RETURN OF PROCESSOR OF WHEAT

For month of February, 193 8

To be executed in duplicate and filed with the Collector of Internal Revenue for your district on or before the last day of following month

PRINT NAME AND ADDRESS PLAINLY BELOW

NIAGARA FALLS MILLING CO.
(Name)

Market St. Lockport, N. Y.
(Street and number, or rural route) (Post office) (State)

Lockport, N. Y.
(Location of processing plant, if other than one given above)

ORIGINAL RETURN RECEIVED APR 1 1938 20TH NEW YORK

Dist. .....

193 ..... (Mo.) (Day) (Year)

Amount paid $ .....

WHEAT

(a) Measure	(b) On hand beginning of month	(c) Received during month	(d) Shipped, destroyed, or otherwise disposed of during month (state separately)	(e) Owned and in bond at close of month	(f) On hand end of month	(g) Tax different rate	(h) Tax
Bushels	14,695	33,119			7,000	.0075	41.81
Pounds	881,580	1987,140			420,340	.0075	2,520.00
Tenings pounds					35,800	"	

1. Wheat processed for producers during month (included in Item 1) ..... Pounds .....
2. Wheat processed under bond for exportation without payment of tax (included in Item 1). Pounds .....
4. Total wheat processed for producers and for exportation (Item 2 plus Item 3) to be deducted from Item 1 ..... Pounds .....
5. Net taxable pounds of wheat processed during month (Item 1 less Item 4) .....
6. Rate of processing tax (30) cents per bushel of 60 pounds), per pound of wheat .....
7. Amount of tax .....
8. Credit (if any) per ..... claim(s) on P T. Form(s) ..... and ..... attached .....
9. TOTAL TAX DUE ..... dollars, and ..... cents

10. Article	Pounds of wheat represented by products and product of each article	Total quantity of each article produced from wheat and in process during the month	Total quantity of each article produced from wheat processed: For producers	For export	Quantity withdrawn for consumption	Quantity withdrawn for export
		Pounds	Pounds	Pounds	Barrels	Pounds
Flour: Whole wheat and graham		25,284				
Other than whole wheat and graham		1,810,644				
CEREAL PREPARATIONS: Flaked, rolled, cut, cracked, or whole wheat						
Other, except those chiefly of bran						

The above is an itemized account of processing of wheat, and of the products of such processing, and of the amount of tax due on such processing by the undersigned processor for the month specified.

(Seal)

(Signed) NIAGARA FALLS MILLING CO.
(If corporation, give name in full)

Attest ..... By ..... Vice Pres.
(Secretary) (President or Vice President)

I swear (or affirm) that all of the statements made above and on the back hereof are true and correct.

(Signed) .....
(Individual, member of firm, or officer of corporation)

Sworn to and subscribed before me this 1st day of April, 1938

Verna E. Zanner
Signature and title of officer authorized to administer oaths — Notary Public

NOTE.—If the processing tax shown by this return to be due is $10 or less, this return may be signed and acknowledged before two witnesses instead of before an officer of any such.

Acknowledged and subscribed in our presence

..... (Name of witness) ..... (Address)

this ..... day of 193

..... (Name of witness) ..... (Address)

[OVER]

STAT

Analysis of entry (g) on face hereof .....

.....

.....

.....

INSTRUCTIONS

(See also Regulations 81 and Treasury Decision 4300)

1. **Processing Tax.**—(a) Pursuant to the provisions of the Agricultural Adjustment Act, by proclamation of the Secretary of Agriculture, and regulations established by him with the approval of the President, the processing tax on the first domestic processing of wheat became effective at the first moment of July 9, 1933. The rate of such tax is 30 cents per bushel of 60 pounds.

(b) In the case of wheat, the term "processing" means the milling or other processing (except cleaning and drying) of wheat, including custom milling for toll as well as commercial milling, but shall not include the grinding or cracking thereof not in the form of flour for feed purposes only (Art. 2 (h) (1), Regs. 81). The processing of that portion of wheat retained as toll is subject to processing tax.

(c) The term "wheat" means wheat of any kind, classification, type, or grade. The weight of wheat subject to the processing tax shall be the weight of clean wheat not artificially dried.

(d) Each processor of wheat shall keep a record of wheat and make report thereof as reports each calendar month, as to (1) the quantity on hand at the beginning of the period, (2) the quantity received during the period, (3) the quantity shipped or delivered during the period, (4) the quantity ground for feed purposes only during the period, (5) the quantity on hand at the end of the period, and (6) the quantity put in process during the period (Art. 2 (h), T.D. 4391).

(e) The processing of wheat for the producer thereof for consumption by his family, employees, or household is exempt from the processing tax. This applies to what is known as custom milling (for toll or for money), but not to cases such as, for example, where a producer delivers wheat to an elevator or store in exchange there for flour. Nor is there any exemption where a producer who has his wheat processed into flour receives a kind or grade of flour other than that which could have been processed from the wheat delivered by such producer (Art. 9 (a), Regs. 81, and Art. 3 (c), T.D. 4391).

2. **Execution of Return.**—(a) The quantities of wheat should be shown in each column in both bushels and pounds. The sum of the number of bushels, as well as the number of pounds, entered in the respective columns (b) and (c) should equal the sum of the respective entries in columns (d), (e), (f), (g), and (h), of the wheat account. The quantity of wheat shipped or delivered and the quantity of wheat destroyed should be shown separately in column (d). The analysis of the entry in column (g) (to balance) should be made in the space provided above. The quantity of wheat put in process during the month entered in column (h), also designated as item 1, should include all wheat processed during the month, except the quantity ground or cracked not in the form of flour for feed purposes only, which should be shown separately in column (e).

(b) The quantity of wheat, in pounds, processed for producers (item 2), and for export (item 3), should be shown separately on the face of the return, and the sum of items 2 and 3 should be deducted from item 1, to ascertain the net taxable pounds of wheat processed.

(c) The number of pounds of wheat required to produce a pound of each article, the total quantity of each article produced from the wheat processed, the quantity of each article produced from wheat processed for producers (the result of processing of the quantity entered under item 2), the quantity of each article produced from wheat processed under bond for export (the result of the processing of the quantity entered under item 3), the quantity of each article delivered to producers, supported by affidavits on P.T. Forms 20 (see par. (e) below), the quantity of each article removed for export, supported by entries for exportation on P.T. Forms 26 (see par. (f) below), must be shown in the spaces provided therefor under item 10. The quantities entered under item 10 shall not include any ingredient added to the wheat in the milling process, or to the articles produced, as in the case of the production of self-rising or blended flours.

(d) The name or description of the articles shown in affidavits on P.T. Forms 20, in entries for exportation on P.T. Forms 26, and in claims for credit must correspond with descriptions under the head of "Articles".

(e) One copy of each producer's affidavit or certificate on P.T. Form 20, received with respect to delivery to producers must be filed with the return to support claims for exemption from processing tax.

(f) One copy of each entry for exportation on P.T. Form 26, covering removal of each shipment from the place of processing during the month must be filed with the return in support of credit for processing under bond for export.

3. **Filing of Returns and Payment of Tax.**—All taxes are due and payable without any assessment by the Commissioner or notice from the collector. Return, with remittance, covering taxes due for any month, must be in the hands of the collector of internal revenue (or his authorized representative) of the district in which the principal place of business of the person making the return is located (or if he has no principal place of business in the United States, to the collector at Baltimore, Md.) on or before the last day of the succeeding month, however, the Commissioner has authority under the law to require the immediate filing of a return and payment of the tax, when such action becomes necessary. In regard to postponement of payment of the tax, see Article 26 (c), Regulations 81. Returns must be signed and sworn to before an officer authorized to administer oaths generally and under seal, or before a deputy collector of internal revenue or revenue agent. If the total amount of tax shown by a return to be due is $10 or less, the return may be acknowledged before two subscribing witnesses in lieu of an oath.

4. **Records.**—Each person required to file a return on this form and pay tax shall preserve accurate records and accounts of all transactions involving the processing of wheat and products thereof, of all transactions involved in any way in any claim for refund, for abatement, or for credit and of processing exempt from tax. (See Article 10, Regulations 81, also Article 3 (b), T.D. 4391.)

5. **Penalties.**—Failure to file on time, 25 percent of tax. Failure to pay on time before assessment, interest at the rate of 1 percent a month. Failure to pay within 10 days after issuance of notice and demand based on assessment approved by the Commissioner, 5 percent penalty and 1 percent interest a month on assessment. Severe penalties for willful failure to collect tax, pay tax, keep records, file returns, or for false or fraudulent return, are imposed by law.

C-2

PRINT IS BAD

Return
Received
Apr. 1, 1935
28th
New York

P T Form 1

ORIGINAL

MONTHLY RETURN OF PROCESSOR OF WHEAT

For month of February 1935

PRINT NAME AND ADDRESS PLAINLY BELOW

NIAGARA FALLS MILLING CO.

Middleport, N. Y.

Middleport, N. Y.

WHEAT

	1. Stock on hand beginning of month	2. Received during month	3. Disposed of or used otherwise than by milling during month (attach explanation)	4. Returned to or taken from mill during month	5. On hand end of month	6. To be milled during the month	7. Put in process during month
Bushels		16,532			1,900	530	18,302
Pounds		1,111,920			114,000	19800	978,120
Running pounds					13,226		

2. Wheat processed for producers during month (included in item 1) ..... Pounds .....
3. Wheat processed under bond for exportation without payment of tax (included in item 1) ..... Pounds .....
4. Total wheat processed for producers and for exportation (item 2 plus item 3) to be deducted from item 1 ..... Pounds .....
5. Net taxable pounds of wheat processed during month (item 1 less item 4) 978,120
6. Rate of processing tax (30 cents per bushel of 60 pounds), per pound of wheat ..... .00 500
7. Amount of tax $4,890.60
8. Credit (if any) per ..... claim(s) on P T Form(s) ..... and ..... attached ..... dollars, and ..... cents $4,890.60
9. Total tax due

10. Article	Pounds of wheat processed in products shown in item 11 (each grade)	Total quantities of each article produced during month (pounds)	Total quantities of each article produced from wheat processed (pounds)		Quantity sold or removed for consumption (pounds)	Quantity sold for export (pounds)
			For producers	For export		
Flour						
Whole wheat and graham						
Other than whole wheat and graham		786,548				
Cereal preparations (milled wheat type, chiefly of whole wheat)						
Other, except those chiefly of bran						

The above is an itemized account of processing of wheat and of the products of such processing, and of the amount of tax due on such processing by the undersigned processor for the month specified.

(Seal)

(Signed) NIAGARA FALLS MILLING CO.

Attest .....

By R K Shaw Vice Pres.

I swear (or affirm) that all of the statements made above and on the back hereof are true and correct.

Sworn to and subscribed before me this 1st day of April 1935

(Signed) R K Shaw

Ulma S Pecore
Notary Public

Acknowledged and subscribed to in our presence

this ..... day of 193

(Name of witness) (Address)

(Name of witness) (Address)

[over]

4-1

Analysis of entry (g) on face hereof

13,220 lbs. of Sorghum plus 794 gals. of water - 19,000

INSTRUCTIONS

(See also Regulations 81 and Treasury Decision 4301)

1. **Processing Tax.**—(a) Pursuant to the provisions of the Agricultural Adjustment Act, by proclamation of the Secretary of Agriculture, and regulations established by him with the approval of the President, the processing tax on the first domestic processing of wheat became effective at the first moment of July 9, 1933. The rate of such tax is 30 cents per bushel of 60 pounds.

(b) In the case of wheat, the term "processing" means the milling or other processing (except cleaning and drying) of wheat, including custom milling for toll as well as commercial milling, but shall not include the grinding or crushing thereof not in the form of flour for feed purposes only (Art. 2 (A) (1) Regs. 81). The processing of that portion of wheat ratained as toll is subject to processing tax.

(c) The term "wheat" means wheat of any kind, classification, type, or grade. The weight of wheat subject to the processing tax shall be the weight of clean wheat not artificially dried.

(d) Each processor of wheat shall keep a record of wheat and make report thereof as requests such schedule specifying (1) the quantity on hand at the beginning of the period, (2) the quantity received during the period, (3) the quantity disposed of or delivered during the period, (4) the quantity ground for feed purposes only during the period, (5) the quantity on hand at the end of the period, and (6) the quantity put in process during the period (Art. 3 (b), T.D. 4301).

(e) The processing of wheat (or the products thereof for consumption by his family, employees, or household is exempt from the processing tax. This applies to what is known as custom milling (for toll or for money), but not to cases such as, for example, where a producer delivers wheat to an elevator or store in exchange there for flour. Nor is there any exemption where a producer who has his wheat processed into flour receives a kind or grade of flour other than that which could have been produced from the wheat delivered by such producer (Art. 9 (c), Regs. 81, and Art. 3 (d), T.D. 4301).

2. **Execution of Return.**—(a) The quantity of wheat should be shown in each column in both bushels and pounds. The sum of the number of bushels, as well as the number of pounds, entered in the respective columns (b) and (c) should equal the sum of the respective entries in columns (d), (f), (g), and (h) of the wheat account. The quantity of wheat shipped or delivered and the quantity of wheat destroyed should be shown separately in column (d). The analysis of the entry in column (g) (the balance) should be made in the space provided above. The quantity of wheat put in process during the month entered in column (h), also designated as item 1, should include all wheat processed during the month, except the quantity ground or crushed not in the form of flour for feed purposes only, which should be shown separately in column (e).

(b) The quantity of wheat, in pounds, processed for producers (item 2), and for export (item 3), should be shown separately on the face of the return; and the sum of items 2 and 3 should be deducted from item 1, to ascertain the net taxable pounds of wheat processed.

(c) The number of pounds of wheat required to produce a pound of each article; the total quantity of each article produced from the wheat processed; the quantity of each article produced from wheat processed for producers (the result of processing of the quantity entered under item 2); the quantity of each article produced from wheat processed under bond for export (the result of the processing of the quantity entered under item 3), the quantity of each article delivered to producers, supported by affidavits on P.T. Forms 29 (see par. (e) below); the quantity of each article removed for export, supported by entries for exportation on P.T. Forms 26 (see par. (f) below), must be shown in the spaces provided therefor under item 10. The quantities entered under item 10 shall not include any ingredient added to the wheat in the milling process, or to the articles produced, or in the case of the production of self-rising or blended flours.

(d) The name or description of the articles shown in affidavits on P.T. Forms 29, in entries for exportation on P.T. Forms 26, and in claims for credit must correspond with descriptions under the head of "Articles".

(e) One copy of each producer's affidavit or certificate on P.T. Form 29, received with respect to delivery to producer must be filed with the return in support of claim for exemption from processing tax.

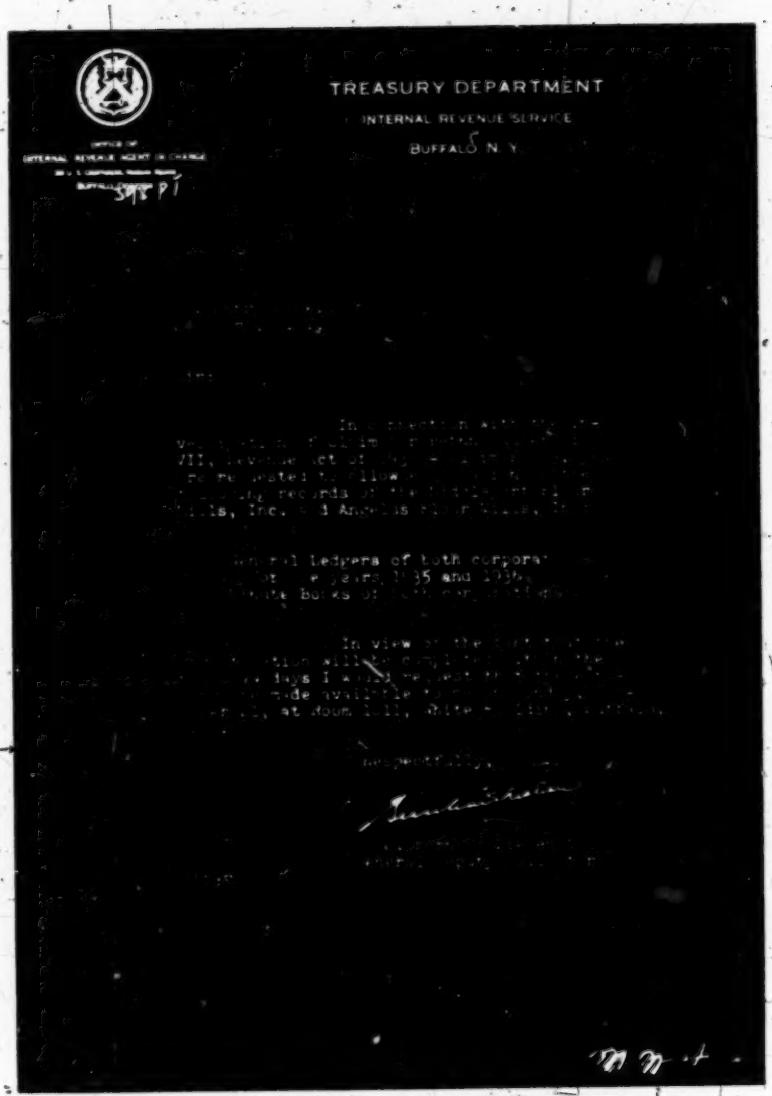
(f) One copy of each entry for exportation on P.T. Form 26, covering removal of each shipment from the place of processing during the month must be filed with the return in support of credit for processing under bond for export.

3. **Filing of Returns and Payment of Tax.**—All taxes are due and payable without any assessment by the Commissioner or notice from the collector. Return, with remittance, covering taxes due for any month, must be in the hands of the collector of internal revenue (or his authorized representative) of the district in which the principal place of business of the person making the return is located (or if he has no principal place of business in the United States, to the collector at Baltimore, Md.) on or before the last day of the succeeding month; however, the Commissioner has authority under the law to require the immediate filing of a return and payment of the tax, when such action becomes necessary. In regard to postponement of payment of the tax, see Article 26 (c), Regulations 81. Returns must be signed and sworn to before an officer authorized to administer oaths generally and under seal, or before a deputy collector of internal revenue or revenue agent. If the total amount of tax shown by a return to be due is $10 or less, the return may be acknowledged before two subscribing witnesses in lieu of an oath.

4. **Records.**—Each person required to file a return on this form and pay tax shall preserve accurate records and accounts of all transactions involving the processing of wheat and products thereof, of all transactions involved in any way in any claim for refund, for abatement, or for credit and of processing exempt from tax. (See Article 10, Regulations 81; also Article 8 (b), T.D. 4301.)

5. **Penalties.**—Failure to file on time, 25 percent of tax. Failure to pay on time before assessment, interest at the rate of 1 percent a month. Failure to pay within 10 days after issuance of notice and demand based on assessment approved by the Commissioner, 5 percent penalty and 1 percent interest a month on assessment. Severe penalties for willful failure to collect tax, pay tax, keep records, file returns, or for false or fraudulent return, are imposed by law.

PRINT IS BAD



TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

BUFFALO N. Y.

A [illegible] A.

[illegible] Certified Public Ac[illegible] [illegible] of the books of account and [illegible] [illegible] Angelus Milling Co., Inc., [illegible] [illegible] thereafter, [illegible] March 1, 1[illegible] [illegible] copies of the working papers [illegible] [illegible] Internal Revenue, two letters of [illegible] and typewritten. [illegible] static copies of the working papers [illegible] Internal Revenue were obtained [illegible] bankruptcy of the Niagara Falls Milling Company.

Niagara Falls Milling Company and Middleport Flour Mills, Inc., (now Angelus Milling Co., Inc.,) had common [illegible] account from July 1, 1938, to January 1, 1939. Both Niagara Falls Milling Company and Middleport Flour Mills, Inc., (now Angelus Milling Co., Inc.,) also had a common set of books; and when the representatives of the Bureau of Internal Revenue in examining the claim of Angelus Milling Co., Inc., for a refund of its processing taxes in July, 1[illegible], and in September, 1940, examined the books of the Niagara Falls Milling Company, they also examined the records of the Angelus Milling Co., Inc.

Deponent was unable to obtain the books of Angelus Milling Co., Inc., until about September, 1941, as they were in the custody of the Bankruptcy Court at Buffalo, New York. Deponent has, however, obtained the essential figures from his partner, Jackson A. Lyon, who in turn obtained them from the representatives of the Bureau of Internal Revenue, to wit, Bernard Lieben. A copy of the affidavit of deponent's partner, Jackson A. Lyon, accompanies deponent's affidavit.

Deponent knows of his own knowledge that representatives of the Commissioner of Internal Revenue investigated the claim for refund of the Angelus Milling Co., Inc., on its merits and sent Angelus Milling Co., Inc., a formal rejection of the claim on May 24, 1941. Deponent further states that he is President of both Niagara Falls Milling Co., Inc., and Angelus Milling Co., and knows of his own knowledge that the government has offered

[redacted] assets of $41,000.00.
[redacted] Angelus Mills-
[redacted] Inc., and [redacted] Angelus Mills Company not
[redacted] the Angelus Mills Co., Inc., nor [redacted] whatsoever
[redacted] Mills Company. [redacted] also one of the
[redacted] Angelus Mills Co., Inc., in bankruptcy.
[redacted] knows that
[redacted] Mr. Harry Dickinson of Lock-
port, New York, [redacted] Angelus Mills Co., Inc., the follow-
ing letter:

[redacted]

Internal Revenue Agent [redacted]
U.S. [redacted]
[redacted]

December 10, 1938

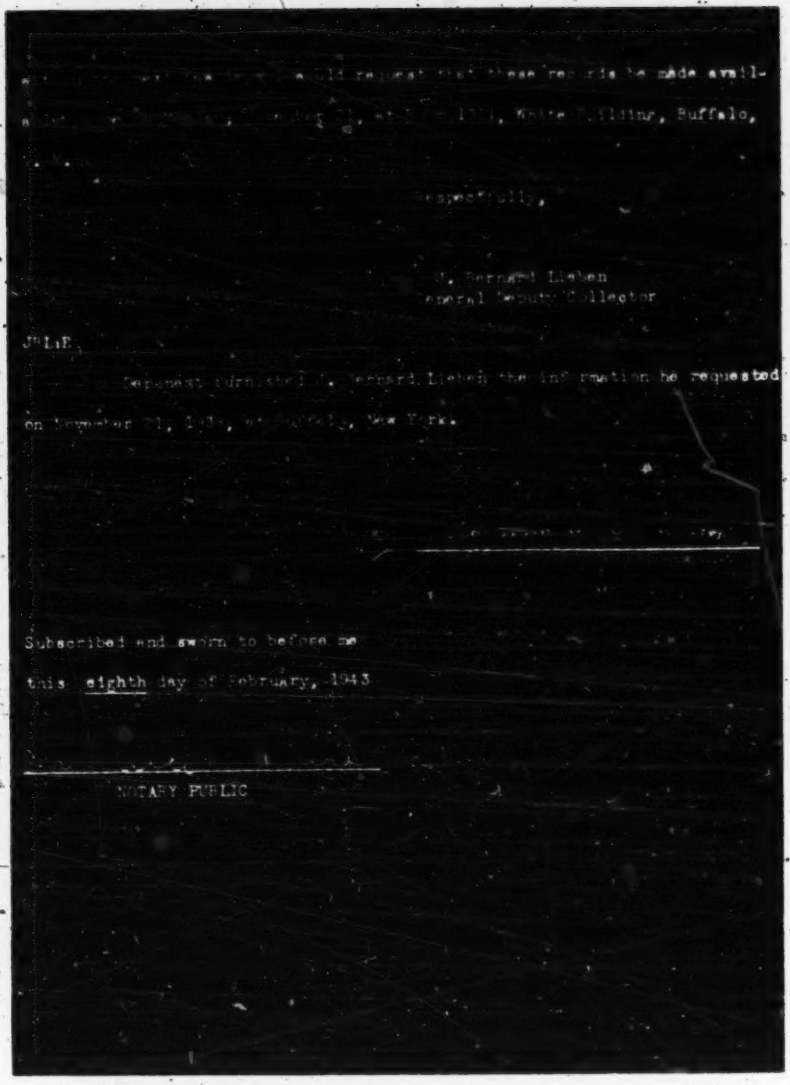
Mr. Harry Dickinson
Lockport, N. Y.

Sir:

In connection with the investigation of claim for refund under Title VII, Kay Bee Act of 1936 - Claim [redacted], you are requested to allow examination of the following records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc.:

General Ledger of both corporations
for the years 1935 and 1936
Minute Books of both corporations

In view of the fact that the investigation will be completed



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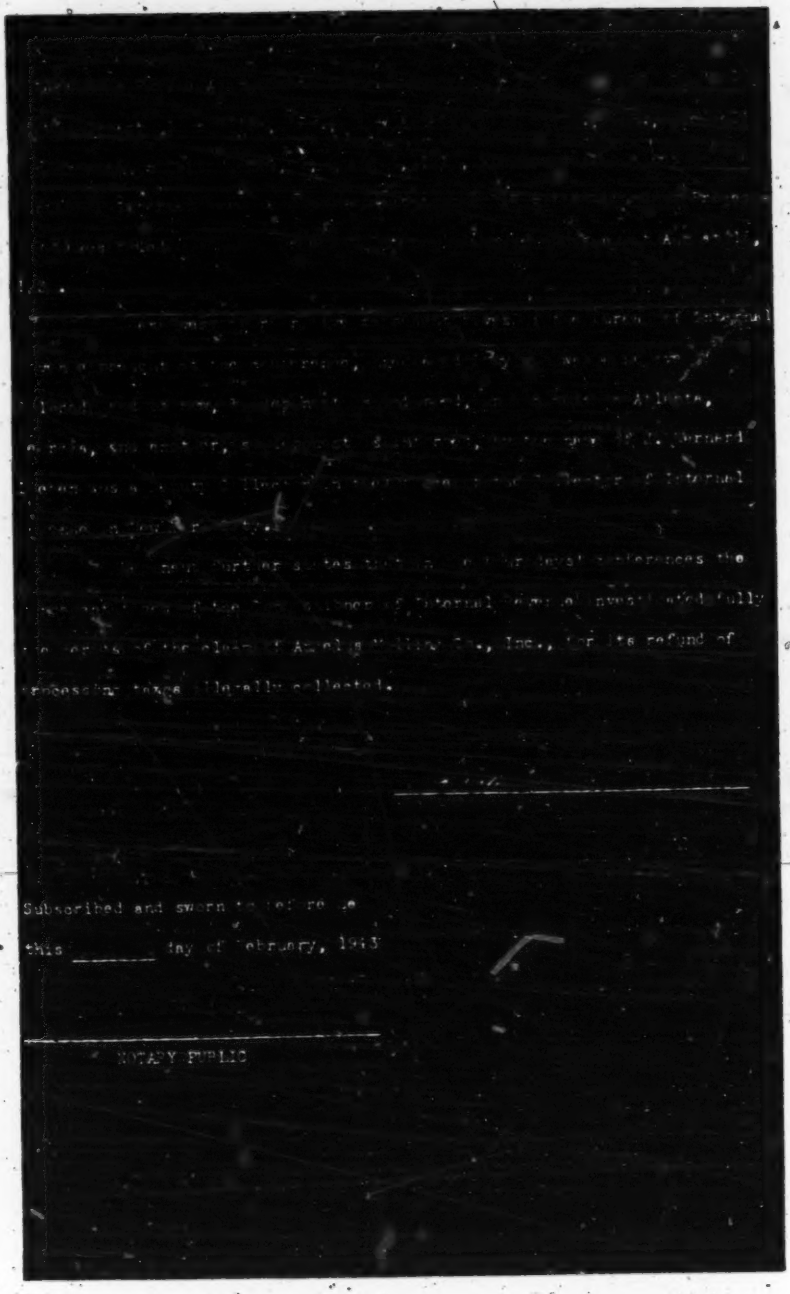

Subscribed and sworn to before me
this _____ day of February, 1913

NOTARY PUBLIC

The Tax Court
of the United States
FILED
Sept. 16, 1943
Enr.
Dkt.
Cal.
Stat.

IN THE TAX COURT OF THE UNITED STATES

ANGELUS MILLING COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. P. T. 308

CORRECTED PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of The Tax Court of the United States:

You are requested to take a transcript of record to be filed in the United States Court of Appeals for the Second Circuit, pursuant to the review taken in the above-entitled case, and to include in such transcript of record copies duly certified as correct of the following documents:

1. Document entries of proceedings before the United States Processing Tax Board of Review and The Tax Court of the United States.
2. Pleadings before the United States Processing Tax Board of Review and The Tax Court of the United States:
   (a) Petition filed August 20, 1941.
   (b) Respondent's Motion for Better Statement of Claim filed October 4, 1941.

(c) Petitioner's Motion to extend time to Reply to Motion for Better Statement of Claim filed October 27, 1941.

(d) Order of Board of October 27, 1941, granting Petitioner's Motion of October 27, 1941.

(e) Amendment to Petition in Response to Motion for Better Statement filed November 21, 1941.

(f) Respondent's Renewal of Motion for Better Statement of Claim to Apply to Petition, as amended, filed November 26, 1941.

(g) Motion for leave to file Amended Petition and Amended Petition filed December 29, 1941.

(h) Verification of Amended Petition filed January 16, 1942.

(i) Order of Board of January 20, 1942, denying Respondent's Motion for Better Statment of Claim, and granting Petitioner's Motion for leave to file Amended Petition.

(j) Respondent's Motion to Dismiss filed February 16, 1942.

(k) Verification of Petition filed June 12, 1942.

(l) Motion to Permit prior Motion to apply to Petition as amended, filed July 25, 1942, and granted July 27, 1942.

(m) Order and Opinion of Board of August 5, 1942, denying the Motion to Dismiss.

(1) Dissenting Memorandum Opinion of Board Chairman William Schwartz.

(n) Answer filed August 21, 1942.

(o) Respondent's Motion to Dismiss on Jurisdictional Grounds filed January 29, 1943.

3. Opinion and Decision of The Tax Court

(a) Opinion of May 4, 1943.

(b) Order of May 4, 1943.

4. Petition for Review and Assignments of Error.

5. Notice of Filing Thereof and Proof of Service.
6. Statement of Evidence Settled or Agreed Upon and Exhibits.
7. This Corrected Praecipe.

(Signed) PREW SAVOY,
Attorney for Petitioner.

I hereby this 16th day of September, 1943, accept due personal service of a copy of the foregoing Corrected Praecipe.

(Sgd) J. P. WENCHEL,
Attorney for Respondent.

[fol. 133] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 156—October Term, 1943

(Argued May 24, 1944. Decided July 6, 1944.)

ANGELUS MILLING COMPANY, Petitioner,

v.

JOSEPH D. NUNAN, Commissioner of Internal Revenue, Respondent

Before: L. Hand, Swan and Frank, Circuit Judges

On petition to review an order of the Tax Court of the United States, dismissing for lack of jurisdiction, a claim for refund of processing taxes, paid in compliance with the Agricultural Adjustment Act.

Prew Savoy, for the Petitioner.

F. E. Youngman, for the Respondent.

[fol. 134] L. HAND, *Circuit Judge:*

The Angelus Milling Company appeals from an order of the Tax Court of the United States, dismissing for lack of jurisdiction, a proceeding originally filed with the Processing Tax Board of Review, for the refund of a processing tax paid by it in compliance with the Agricultural Adjustment Act. On August 20, 1941, the company filed its petition with the Board to review the Commissioner's disallowance of its claim for refund. The Commissioner moved to dismiss the proceedings for lack of jurisdiction, and this motion was denied on August 5, 1942. On August 21st of that year, he filed his answer, again setting up lack of jurisdiction. Congress abolished the Board on December 31, 1942, and transferred its jurisdiction to the Board of Tax Appeals—now the Tax Court of the United States—and on January 29, 1943, the Commissioner renewed his motion which this time the Tax Court granted on May 4, 1943. This appeal (petition to review) followed. The ground of dismissal was that the petitioner had never filed an adequate claim for refund, as allowed by §903 of Title 7 of the Revenue Act of 1936, and by the regulations promulga-

ted thereunder: Articles 202, 601, 603, and 605, of Regulations 96.

The facts were as follows. The Angelus Milling Company, is a New York corporation, having its principal office in Niagara Falls, New York; until June 13, 1933 it was known as "Middleport Flour Mills, Inc." The Niagara Falls Milling Company, Inc. is a similar corporation; and between July 9, 1933 and January 6, 1936, both companies were processors of wheat within the meaning of the statute. Throughout that period they had one and the same majority shareholder, the same president, the same officers, a common set of books of account, a joint bank account, and the same employees. On these books each company was [fol. 135] charged with the cost of the wheat bought for it, and the cost of its manufacture, etc., and was credited with the selling price. Between July 9, 1933 and January 31, 1935, they filed with the Collector joint returns on account of their operations as processors, and paid over $324,000 in processing taxes. Between February 1, 1935 and November 30, 1935, the Niagara Company filed returns for itself and the Angelus Company, and paid the Collector $110,000. The Agricultural Adjustment Act was declared unconstitutional on January 6, 1936 (*United States v. Butler*, 297 U. S. 1), and on June 23, 1936, three claims were filed with the Commissioner, all stating the name of the taxpayer and claimant as "Niagara Falls Milling Company, Inc. and/or Middleport Flour Mills, Inc." (We shall call these claims: A-1, A-2 and A-3.) A-1 was for $57,875, payments made by the Niagara Falls Milling Company between July 31, 1933 and December 30, 1933; A-2 was for $244,895.40, payments made by that company between January 29, 1934 and December 31, 1934; and A-3 was for $131,274.42, payments made by that company between January 30, 1935 and December 12, 1935. The total of these is $434,045.27.

The Angelus Company does not assert that these claims conformed with the statute or regulations; but while they were still undetermined, on June 30, 1937, the Niagara Company filed a claim for refund on its own behalf alone in the sum of $436,231.73, for payments made between July 15, 1933 and December 30, 1935. This claim (which we shall call Claim B), was in proper form, and the Commissioner had power to consider it, though only as a claim of the Niagara Company. Although the amount claimed differs

by about $2000 from the aggregate of the amounts claimed in Claims A-1, A-2 and A-3, it was apparently intended to cover the processing taxes paid by both companies. On August 15, 1938, the Angelus Company filed a claim on its own behalf for the refund of $145,839.12 (which we shall [fol. 136] call Claim C). This was not in proper form; it complied in no way with the regulations, it merely contained, as an appendix, an apportionment between the Angelus Company and the Niagara Company of the aggregate to a penny of the amounts claimed in Claims A-1, A-2 and A-3. In an attached affidavit it declared that it "was originally filed, * * * in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc." It was an attempt apparently to perfect or amend Claims A-1, A-2 and A-3. On May 24, 1941, the Commissioner rejected Claim C on the ground that it was incomplete under the regulations, and did not give him jurisdiction; and it is plain that neither Claims A-1, A-2 and A-3, taken together, nor Claim C taken in conjunction with them were in any way sufficient and that no award could have been made under them. *Lee Wilson* v. *Commissioner*, 111 Fed. (2) 313 (C. C. A. 8): S. C. 123 Fed. (2) 232. The Angelus Company answers this objection in two ways. First, it says that the Commissioner considered its claim upon the merits, and by doing so gave the taxpayer to suppose that he meant to consider the claim as it stood; and that this conduct "estopped" him from later rejecting it for irregularities of form. Second, it says that the five claims: A-1, A-2, A-3, B and C, which were all pending at the same time, collectively made an adequate claim by cross reference to one another, and should have been read together, in which case their meaning was plain.

The evidence upon which the company seeks to support the claim of "estoppel" is as follows. On November 18, 1938, the General Deputy Collector addressed a letter to the company's president at that time, Dickinson, asking leave to examine its records for the years 1935 and 1936, including its ledgers and minute books. This was granted. The company submitted two affidavits in opposition to the Commissioner's motion: one by O'Connor, its president at a later time; another by Lyon, a certified public accountant. [fol. 137] In his affidavit O'Connor swore that he had procured photostatic copies of the "working papers" of two "representatives" of the Bureau of Internal Revenue, who

examined the Angelus Company's records at the time they were examining those of the Niagara Company—a fairly obvious inference anyway, since there was only one set of records. These two officials, O'Connor swore, "investigated the claim for refund, of the Angelus Milling Co., Inc., on its merits and sent Angelus Milling Co., Inc. a formal rejection of the claim on May 21, 1941." In his affidavit Lyon swore that on September 4, 5, 6 and 7, 1940, on behalf of the Angelus Company he had conferences with "representatives of the Bureau "with respect to the claim for refund of processing taxes filed * * * on or about August 15, 1938. There were four or five representatives * * * present at the conferences; * * * in the four days' conference the representatives * * * investigated fully the merits of the claim of Angelus Milling Co., Inc. for its refund of processing taxes legally collected."

Since the Tax Court disposed of the petition upon motion to dismiss, and not after a hearing, the company is entitled to insist that we take in its favor any implications which can be drawn from this evidence; and we shall dispose of the appeal upon that assumption. Moreover, we shall also assume that, if the controversy had been between private parties, and if the Commissioner's "representatives" did in fact consider the claim upon the merits to the knowledge of the company's president and accountant, without suggesting that it was insufficient in form, it would have been too late thereafter to reject it. Therefore the question comes to whether the Commissioner is subject to the same rules in that regard as are private parties. It is abundantly settled that after the Commissioner has once rejected a claim for irregularities in form, it is too late to amend it. *Sugar Land Ry. Co.* v. *United States*, 48 Fed (2) 973 (Ct. Cls.); *New England Mutual Life Ins. Co.* v. *United States*, 49 Fed. (2) 662 (Ct. Cls.); *Wausau Sulphate Tire Co.* v. [fol. 138] *United States*, 49 Fed. (2) 665 (Ct. Cls.); *Solomon* v. *United States*, 57 Fed. (2) 150 (C. C. A. 2); *National Cattle Loan Co.* v. *United States*, 62 Fed. (2) 168, 170 (C. C. A. 7); *Elbee Chocolate Co.* v. *United States*, 63 Fed. (2) 773 (C. C. A. 2); *New York Trust Co.* v. *United States*, 87 Fed. (2) 889 (C. C. A. 2); *Edwards* v. *Malley*, 109 Fed. (2) 640, 645 (C. C. A. 1). In all these cases the time had necessarily already expired within which a claim could be filed, when the amendment was made, so that the taxpayer had to

have an excuse for his delay. The opinions do not expressly say that, had the Commissioner not rejected the claim before the amendment was offered, the excuse would have been good; but it seems most likely that they so assumed, for otherwise it would have been unnecessary to resort to rejection as the ground of decision. However, so far as appears, the excuse in no case was the Commissioner's conduct in inducing the taxpayer to rely upon an irregular claim; and it is theoretically possible that a right of amendment after rejection might exist in that situation, even if it existed in no other. Indeed, the Fifth Circuit appears to have so held in *United States* v. *Humble Oil and Refining Co.*, 69 Fed. (2) 214. See also *Weilman & Casey* v. *United States*, 4 Fed. Supp. 155 (D. C. E. Pa.). Be that as it may, *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 72, is flatly to the contrary. The Commissioner had given as plain indication as he did here, that he meant to dispose of the claim upon the merits, and yet in the end he rejected it for defects in form only. The taxpayer won for two reasons: first, because the amendment did not substitute so divergent a claim as to be a new "cause of action"; and second, because the amendment had been filed before rejection (p. 72). The second ruling necessarily presupposed that the rejection of a claim would cut off any opportunity for amendment, even though the Commissioner had lulled the taxpayer [fol. 139] into a false security. The language used was unequivocal: "'An argument is made that at the time of this amendment the claim had been finally rejected and the proceeding thereby ended. If so, it was too late. *McKesson & Robbins* v. *Edwards, supra; Solomon* v. *United States*, 57 Fed. (2) 150. When correction is thus postponed, there is no longer anything to amend, any more than in a law suit after the complaint has been dismissed."

There is therefore no distinction between the excuse of "estoppel" and any other excuse for delay in correcting a claim after rejection. A taxpayer who files a claim which does not conform with the statute, takes his chances that in the end the Commissioner may reject it, no matter how complaisant he may appear to be. The best he can hope is to amend before rejection; and indeed even before that occurs, he may not substitute a completely different claim. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt*

Oil Co., 302 U. S. 528. This doctrine that no amendment may be too divergent helps to confirm the doctrine that rejection puts an end to all amendments, on which we are relying here. In point of justice it is as harsh to deny a taxpayer the privilege of substituting an altogether new claim after the time has expired, as it is to deny him the privilege of correcting irregularities in his claim after rejection. For, by hypothesis, in both cases the Commissioner has given the taxpayer reason to suppose that he will consider the claim upon the merits, and by so doing has caused him not to amend while he could. It makes no difference to the taxpayer what was his mistake; in either case he awakes to learn that it is never safe to put his trust in officials. The notion behind the doctrine is the familiar one that, not only may not the United States be sued unless it consents, but that its consent must be closely scrutinized and jealously circumscribed. That principle goes back to [fol. 140] the beginning of the Republic, and the Supreme Court has never shown any tendency to relax it. How far a government should accept the same responsibility for defaults of its agents that it imposes upon individuals, is clearly a matter for Congress. The result is often extremely harsh, as this case shows; but he who deals with the government must dot his i's and cross his t's; and if he assumes that he may rely upon the ordinary rules which apply as between individuals, he is doomed to disappointment.

There remains the second question: whether Claim C should be taken as conforming with the regulation because it incorporates Claim B by reference. It certainly did not do so expressly; on the contrary, as we have seen, it speaks of Claims A-1, A-2 and A-3 as its original and merely asks an apportionment of the sums demanded in them. Since Claims A-1, A-2 and A-3 were themselves insufficient, Claim C can of course gain nothing from them; and the only possible argument would be to say that Claim B was intended as a substitute for Claims A-1, A-2 and A-3, and that therefore when Claim C incorporated within itself Claims A-1, A-2 and A-3, it incorporated the substitute as well. That was certainly not the intention: Claim C having expressly referred to Claims A-1, A-2 and A-3 as its original, although Claim B was already in existence—and incidentally was the claim of another claimant—could not have intended to make that claim a part of itself. It

is true, as we have said, that Claim B on comparison with Claims A-1, A-2 and A-3, showed that apparently it included the taxes of both companies. But what was the Commissioner to infer from that? Nothing more than that somewhere amid the tangle of claims these two companies were making claim for all processing taxes paid collectively by both. It seems unnecessary to labor the argument that to treat the regulations as countenancing anything of the kind would be in effect to repeal them.

Order affirmed.

[fol. 141] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of July one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

ANGELUS MILLING COMPANY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

Alexander M. Bell, Clerk.

[fols. 142-143] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Angelus Milling Company v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 24, 1944. Alexander M. Bell, Clerk.

[fol. 144] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY, *Petitioner*

vs.

JOSEPH D. NUNAN,
Commissioner of Internal Revenue

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. _____

ANGELUS MILLING COMPANY, *Petitioner*

vs.

JOSEPH D. NUNAN,
Commissioner of Internal Revenue

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Prew Savoy, on behalf of the Angelus Milling Company, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on July 24, 1944, affirming the decision of the Tax Court of the United States.

OPINIONS BELOW

The first decision of the United States Processing Tax Board of Review of January 20, 1942 (R. 71), and its second decision of August 5, 1942, together

with supporting and dissenting memoranda (R. 80), denying respondent's motions to dismiss, were not reported. The findings of fact, opinion and decision of the Tax Court of the United States, granting a motion to dismiss, (R. 91) is reported at 1 T.C. 1031. The opinion of the Circuit Court of Appeals (R. 133) is not yet reported.

JURISDICTION

This case involves a claim for the refund of $145,839.12, paid as processing tax on wheat, under the Agricultural Adjustment Act of May 12, 1933, as amended. The Tax Court of the United States, on May 4, 1943, dismissed the proceeding before it for lack of jurisdiction, refusing to consider the claim for refund on the merits (R. 98). The case was brought to the United States Circuit Court of Appeals for the Second Circuit by a Petition for Review filed by the Petitioner with the clerk of The Tax Court of the United States, on July 27, 1943 (R. 99), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code, and Section 906(g) of the Revenue Act of 1936, as amended by Section 510 of the Revenue Act of 1942. The Judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming the decision of The Tax Court of the United States, was entered July 24, 1944 (R. 139). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Petitioner may maintain its suit for refund of taxes, where the claim for refund contained the nature of the claim, but not the data in support thereof, and where the Commissioner, through an examination of the claim on the merits by a deputy collector, learned the facts and obtained the basic data which, if presented in the claim, should have caused a refund.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are presented in Appendix A of the Appendices, printed as a separate document.

STATEMENT

This appeal involves a claim for refund of $145,839.12, paid as processing tax on wheat, under the Agricultural Adjustment Act of May 12, 1933, as amended, declared unconstitutional in *United States v. Butler*, 297, U. S. 1.

The proceeding was initiated August 20, 1941, before the United States Processing Tax Board of Review (R. 7), for a review of the disallowance by the Commissioner of Internal Revenue, under date of May 23, 1941 (R. 40), of the Petitioner's claim for refund (R. 11-39).

The disallowance was based on two grounds: (1) that Petitioner was not the taxpayer, and (2) that the claim filed was not complete, in accordance with the statute and Treasury regulations.

On October 4, 1941, Respondent filed a Motion

for Better Statement of Claim (R. 42). On November 21, 1941, Petitioner filed an Amendment to Petition in Response to Motion for Better Statement of Claim (R. 49), having in the interim been given copies of Petitioner's Processing Tax Returns by the Commissioner, who had therefore refused to produce such copies, on the grounds that they were the returns of Niagara Falls Milling Co.

On November 26, 1941, Respondent filed a Renewal of Motion for Better Statement of Claim to apply to Petition as amended (R. 54). At the argument on the Motion, Petitioner was allowed to amend the Petition, and filed an Amended Petition December 29, 1941 (R. 63). The Respondent's Motion was then denied, January 20, 1942. (R. 71.)

On February 16, 1942, Respondent filed a Motion to Dismiss, on the grounds that the claim was incomplete and that Petitioner was not the taxpayer, so that the Board lacked jurisdiction to review the Commissioner's disallowance of the claim for refund. (R. 72.) This motion was dismissed, after argument and the submission of evidence, on August 5, 1942 (R. 80), and on August 21, 1942, Respondent filed an Answer. (R. 82.)

On October 22, 1942, the Appeal was set for hearing on the merits on February 8, 1942. (R. 5.)

On October 21, 1942, the Revenue Act of 1942 became a law. Under Section 510 thereof, the life of the United States Processing Tax Board of Review terminated December 31, 1942, and The Tax Court of the United States thereafter had jurisdiction of all cases of that Board in their then *status*.

On January 29, 1943, Respondent filed a Motion to Dismiss on Jurisdictional Grounds with The Tax Court. (R. 86.) The Tax Court heard arguments thereon, received evidence, and on May 4, 1943, granted Respondent's Motion. (R. 91, 98.)

Petitioner thereupon filed a petition for review by the United States Circuit Court of Appeals for the Second Circuit (R. 99). That Court, on July 24, 1944, affirmed the decision of The Tax Court. (R. 133, 139.)

From the date of the filing of the Petitioner's claim for refund to the date of its disallowance, including the examination of the claim on the merits by the Deputy Collector, the Commissioner contended *only* that Petitioner was not the taxpayer, and that Niagara Falls Milling Co. was the taxpayer. This being a fact to be proved at a trial on the merits, the Processing Tax Board of Review, The Tax Court, and the Circuit Court of Appeals accepted Petitioner's allegations on the subject as true, and refused to dismiss on such ground.

The dismissal was based on the ground that the claim for refund *on its face* was incomplete and not in accordance with the statute and the pertinent Treasury regulations, and that Petitioner had failed to show that such defect had been waived by the Commissioner. The question of a defect in the claim had never been raised *before* the Commissioner's letter of disallowance, and before Petitioner had refused to withdraw its claim to permit the Commissioner to make a settlement with Niagara Falls Milling Co., *after* the claim had been examined on the merits, and *after* the Commissioner had all of the

data lacking on the face of the claim. Several days were spent by representatives of the Commissioner examining the merits of the claim, and the question of a defect in the claim was never there raised. The usual letters, written all other claimants, requesting supplemental information and permitting its filing, to cure defects on the face of the claim, were never sent this Petitioner.

On the date on which the claim was rejected, the Commissioner, as a result of the examination made, had in his possession all of the data missing on the face of the claim, which showed a margin favorable to Petitioner's claim.

The reasons for not requesting supplemental information, and the reasons why any defects in the claim have been waived, and thereby cured, will be obvious from the facts brought to the attention of the Processing Tax Board of Review, The Tax Court, and the Circuit Court of Appeals.

The following facts, whether sworn to or supported by evidence filed, have never been controverted by other facts; because they are true and are known to be true by the Commissioner.

They are:

Petitioner is a corporation, organized and existing under the laws of the State of New York, with its principal office at Niagara Falls, New York. On June 13, 1933, the name of Petitioner was changed from "Middleport Flour Mills, Inc." to "Angelus Milling Company, Inc." Since that date, Petitioner has been known as "Angelus Milling Company, Inc." and "Middleport Flour Mills," the name "Angelus"

connoting the brand of flour, and the name "Middleport" designating the locale of one of the flour mills.

During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner was a processor of wheat.

Niagara Falls Milling Co., Inc., hereinafter called "Niagara," is a corporation, organized and existing under the laws of the State of New York. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Niagara was a processor of wheat.

During the period July 9, 1933, to January 6, 1936, Niagara and Angelus had one and the same majority stockholder, a common President, a common set of officers, including a common Secretary (later Vice President), one J. W. Schwan, who signed all tax returns and checks in payment of tax, a common set of books of account, a joint bank account, and the same employees.

When the flour of Petitioner was manufactured and sold, Petitioner was charged with the cost of wheat and the cost of manufacture, overhead, etc., and was credited with the selling price. The same procedure was followed with respect to the wheat and flour of Niagara.

For the period July 9, 1933, to January 31, 1935, *joint returns*, on account of the processing of wheat by Petitioner and Niagara, at the mill at Lockport, were filed with the Collector of Internal Revenue for the *28th District* of New York (R. 110, 113-120), and tax in the sum of $324,016.25, was paid him on account of such proceedings.

For the period February 1, 1935, to November 30, 1935, returns were filed, in the name of Niagara, on

account of the processings of wheat by both Petitioner and Niagara, at the mill at Lockport (R. 110-111, 121) and at the mill at Middleport (R. 111, 123), with the Collector of Internal Revenue for the *28th District* of New York, and tax, in the sum of $110,029.02, was paid him on account of such processings.

All of the foregoing returns were kept in the files of Niagara in the Bureau of Internal Revenue, where counsel for Petitioner obtained them, after the filing of the Petition with the Processing Tax Board of Review, the files of the two corporations being together in the Bureau of Internal Revenue in the custody of the same person.

Of the aforesaid sums paid as processing tax on wheat, the following amounts were paid said Collector, on the dates below set forth, on account of the processings of wheat of Petitioner listed below, out of monies belonging to Petitioner:

Date	Units Processed (in bushels)	Tax Paid
1933		
July-August	19,505	$ 862.02
September	20,619	3,489.05
October	24,368	5,447.69
November	21,728	6,185.57
December	26,067	7,728.11
1934		
January-February	63,797	15,991.82
March	18,471	9,933.35
April-May	52,888	16,866.78
June	28,144	8,663.05
July	21,920	8,866.82
August	35,475	8,696.02
September	27,674	8,947.71
October	27,438	9,140.43
November	22,459	9,078.89
December	36,091	7,585.26
1935		
January-February	44,248	13,862.57
March-April	47,597	13,864.29
May	39,009	9,549.69
June	21,237	6,279.70
July	21,143	5,563.14
August	24,998	4,034.66
September	32,852	5,274.70
October	30,187	840.67
	706,906	$186,751.99

On or about June 23, 1936, *joint claims* were filed, on Form 843, by "*Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc.*" with the Col-

lector of Internal Revenue for the *28th District* of New York, for the refund of processing taxes on wheat paid by Petitioner and Niagara, in the total sum of $454,045.27 (Exhibit A-1, A-2 and A-3, attached to the Petition), (R. 11-19), paid to him on account of the processing of wheat by them.

On or about June 30, 1937, Niagara filed a claim for the refund of processing tax on wheat, in the sum of $436,231.73, with the Collector of Internal Revenue for the *28th District* of New York, paid to him on account of the processing of wheat by Niagara and by Petitioner. *This claim was complete on its face.* (Exhibit B attached to the Petition.) (R. 20-29.)

On or about August 15, 1938, Petitioner filed a claim for the refund of $145,839.12, paid out of its monies, on account of the processing of wheat by it, with the Collector of Internal Revenue for the *28th District* of New York, designating this claim as *"Amendment to Claim."* (Exhibit C attached to Petition) (R. 30-39), and showing its interrelationship with Niagara. (R. 32-33.)

Schedule A, which contained the volume of sales made and the taxes paid, bore the following caption—(R. 32):

> "Allocation of Refund Due Niagara Falls Milling Company and Middleport Flour Mills Inc. (Now Angelus Milling Co., Inc.)"

There followed an explanatory statement respecting the two corporations and the allocation of the refund of taxes claimed.

Under date of November 18, 1938, the Internal Revenue Agent in Charge of the Internal Revenue Service at Buffalo, New York, the *28th Collection District* of New York, in connection with the investigation of the claim of Niagara, sent to Mr. Harry Dickinson, the President of both Petitioner and Niagara, the following letter:

> "In connection with the investigation of Claim for refund under Title VII, Revenue Act of 1936—Claim F5899;[1] you are requested to allow examination of the following records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc.:
>
> General Ledgers of both corporations for the years 1935 and 1936.
>
> Minute Books of both corporations.
>
> "In view of the fact that the investigation will be completed within the next few days I would request that these records be made available to me on Monday, November 21, at Room 1011, White Building Buffalo, New York.
>
> Respectfully,
>
> J. BERNARD LEIBEN,
>
> JBL:E. *General Deputy Collector*" (R. 125)

This letter was occasioned by the fact that the *Commissioner's* agent knew from the returns and claims filed, that Middleport, Angelus and Niagara were interrelated. The conferences which followed established that the companies had a common set of

[1] Claim of Niagara (R. 20-29).

books of account, a common bank account and common officers.

On or about September 4, 5, 6 and 7, 1940, the aforesaid J. Bernard Lieben, Deputy Collector of Internal Revenue, *28th District* of New York, and other representatives of Respondent, conferred with the accountant for Petitioner, respecting Petitioner's claim for refund, fully investigating said claim, and as a result of such conference and examination obtained, from the common books of account of Petitioner and Niagara, all of the basic data and figures required to complete Petitioner's claim. (Appendix B.)

Consideration of Petitioner's claim on the merits was the natural result of the Bureau's examination of Niagara's claim and of the common books of account and bank account of the two companies, which followed Lieben's letter of November 18, 1938.

Under date of May 23, 1941, the Commissioner of Internal Revenue, without having at any time requested from Petitioner any additional information, *in view of the complete information in his possession, a copy of which he gave Petitioner's accountant*, and without the usual conferences in Washington, granted in every other such known claim, in a letter sent by registered mail, disallowed the claim for refund of Petitioner filed August 15, 1938, in its entirety (Exhibit D attached to Petition) (R. 40), relying on a technicality, *and for the first time complaining of the incompleteness of the claim for refund.*

On that date, *the books* of Petitioner and of Niagara were involved in bankruptcy proceedings in-

volving Niagara and were unavailable to Petitioner but were available to the Commissioner, and he had all of the data which the claim of Petitioner lacked. Also, the time to amend the claim had expired

Prior to filing a petition for a review of the disallowance of the Commissioner with the Processing Tax Board of Review, counsel sought to obtain from the Commissioner copies of the processing tax returns of Petitioner and Niagara. Such copies were refused, for the reason given that they were in the file of Niagara and not that of Petitioner. Consel finally obtained such copies and filed them with the Board in connection with Respondent's Motion for Better Statement of Claim. (R. 47, 110-111, 113-124.)

The foregoing facts, none of which can in good faith be denied,—the filing of joint processing tax returns, the filing of joint claims for refund and separate claims for refund, the separate claim for refund of Petitioner showing the interrelationship with Niagara, the Bureau procedure as to these returns and as to the claims for refund, the examination by the Commissioner of the claims for refund of both Niagara and Petitioner on the merits, and the giving of the basic data lacking on the face of the claim to Petitioner, definitely show:

1. That from 1933 to 1936, 1938 to 1940, and 1941 to 1942, the Commissioner knew of the interrelationship of Niagara and Petitioner.

2. That an examination of Niagara's claim for refund on the merits, which claim contained Petitioner's basic data, was a practical impossibility without

also examining Petitioner's claim for refund on the merits.

3. That Petitioner's claim for refund was examined on the merits, in 1940, at which time the Commissioner obtained all of the data not supplied on the face of the claim, which data supported the refund.

4. That, if all of the claims for refund filed be considered together, Petitioner's claim is not defective, as Niagara's claim contains all of the margin data required.

5. That, in any event, the Commissioner waived every defect in Petitioner's claim for refund, regardless of his letter of disallowance, and regardless of the fact that the usual hearings or opportunity to supplement the claim were not accorded Petitioner, by examining Petitioner's claim on the merits and obtaining all of the required data lacking on the face of the claim.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In failing to hold that, if the claims for refund of Niagara and Petitioner be considered together, Petitioner's claim is not defective.

(2) In failing to hold that, having examined Petitioner's claim for refund on the merits, and having all of the margin data lacking on the face of the claim, the Commissioner waived any defect in Petitioner's claim.

(3) In holding that, after a taxpayer has filed a timely claim for refund, which has been considered on the merits, the Commissioner, by such an examination, which results in his obtaining all of the data

lacking on the face of the claim, does not waive any defects of form in the claim, but the taxpayer must amend as to any defect in the form of the claim, before its rejection.

(4) In holding that, in dealings with Government officials, a taxpayer may not rely upon the same rules of equity, justice and fairness which apply as between individuals, but can be misled into not amending a claim, defective as to form, until it has been rejected and when it is too late to amend.

(5) In dismissing Petitioner's claim for refund for lack of jurisdiction and in refusing to order a hearing on the merits.

REASONS FOR GRANTING THE WRIT

(1) The question involved presents a basic issue, not yet decided by this Court, which is of "great importance in the administration of the revenue acts." (Appendix C.) The question is not limited in application to claims for refund of processing taxes, but is equally applicable to all claims for refund. Thousands upon thousands of claims for refund are filed each year, and will be filed in the Second Circuit, subject to the decision below, until corrected. The preponderance of such claims are filed without the benefit of counsel versed in the intricacies of the applicable statutory provisions and regulations. Freely, the claimants confer with Government officials, in connection with their examination of claims for refund on the merits, until long after the statutory time to amend has expired. When all of the facts supporting the claim have been thus brought to the attention of the Commissioner, he should not be

permitted to reject the claim for a defect in form, especially when a mere amendment of the claim, supplying the data which the Commissioner already has, would cure the defect. Such a defect, under such circumstances, circumstances which exist in this case, should be deemed to have been waived.

That this question is of great general importance in the administration of the Revenue Acts cannot be denied by the Solicitor General. In fact, in fairness to taxpayers, and in frankness, the Solicitor General should join in this request, if his representations to this Court, in 1932, were correct in *United States* v. *Memphis Cotton Oil*, 288 U. S. 62 (Appendix C.)

In his Petition for a Writ of Certiorari, in *United States* v. *Memphis Cotton Oil, supra*, the sole question presented was the very same question as that presented in the instant case. (P. 1, App. C.) The petition never mentioned the presence of the question which formed the basis for the decision, and *the petition was granted.*

In connection with the reasons for granting the writ, the Solicitor General said:

> ". . . They (United States v. Factors and Finance Co. and the then subject case) arise under the same statutory provisions and are *equally* of great importance in the administration of the revenue acts. (Italics supplied.)
>
> "2. The decision in the instant case is an extension of the doctrine laid down by the Court of Claims in the Factors and Finance Company case. In the instant case the taxpayer never filed any paper specifying the nature of its claim

for refund. (Not so here. R. 30-33.) The Commissioner's knowledge of grounds on which a claim might have been based came solely through his agents. (So here as to the supporting data, App. B.) As to one of the taxable years in question that knowledge reached the Commissioner at a date when the period for filing a claim for refund of taxes for that year had expired. (Not so here, App. B.) As to both years the taxpayer entirely failed to follow the statutory requirement that the facts relied upon in support of the claim should be clearly set out. If the decision of the Court of Claims in the instant case is correct, the strict requirements of the statute, that claims for refund be filed by taxpayers, are almost entirely abrogated. In such an event a taxpayer who had filed a general claim within time could secure a refund if entirely without the taxpayer's knowledge the Commissioner had learned that an over-payment of taxes had been made by him." (App. C.)

Of course, that is true, and the fact is that it is the duty of the Commissioner to refund tax he finds has been overpaid, without the requirement that a claim for refund be filed, and he very frequently does so.

However, the fact of importance now is that the question presented in the Petition for the Writ of Certiorari, in the *Memphis Cotton Oil* case was not decided, a fact which the Court below failed to note. This Court said, at page 73:

> "We find it unnecessary to determine whether the conduct of the Commissioner in investigating the claims upon their merits and reporting to the claimant the result of his inquiry was a waiver of defects of form which would call for the return of overpayments although no amendment had been offered."

The question presented in the *Memphis Cotton Oil* case and in the instant case has never been decided. If it was of general importance then, in 1932, it is of greater importance now, when tax statutes are more complicated, taxes are higher, and more claims for refund are being, and will be, filed.

If the importance of the question was such as to support the granting of a writ requested by the Government, it is respectfully urged that the importance of the question now equally justifies the granting of a writ requested by a taxpayer.

The question should be decided now and clearly settled, in the interest of a fair and just administration of the revenue acts, before other Circuit Courts make the error the Court below made, in its interpretation of the decision in *U. S.* v. *Memphis Cotton Oil Co., supra.* (R. 137.)

(2) The decision below is in substance in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *U. S.* v. *Humble Oil and Refining Co.* 69 F. (2d) 214, (decided a year *after* the decision in *U. S.* v. *Memphis Cotton Oil Co., supra*), with the decision of the Court of Claims in *Memphis Cotton Oil Co.* v. *U. S.* 59 F. (2d) 276 (affirmed on other grounds in 288 U. S. 62) and with decisions of

the District Court for the Eastern District of Pennsylvania.

In the *Humble Oil* case, the Court held that the only restriction on the Commissioner is that the claim be timely filed. The facts in support thereof may be filed at any time, and such a defect in form can be waived.

The Court of Claims, in the *Memphis Cotton Oil* case had before it the very question presented in the instant case and decided that question in favor of the taxpayer-claimant, exactly contrary to the Court below.

That Court of Claims said, at page 280:

> "The Plaintiff might have amended the claims before the Commissioner had acted thereon so as to state the facts relied upon, but the facts obtained by the Commissioner before he had acted rendered amendment unnecessary *and* fulfilled the requirement of the regulations that all facts relied upon should be set forth by the taxpayer."

We are presented with that very same situation in the subject case.

While it is true that this Court affirmed that decision, the affirmance was based on other grounds, and *the question which formed the basis for the granting of the writ went unanswered*. (288 U. S. 62/73.) It necessarily follows that, in cases coming before the Court of Claims, which involve the very question involved in the instant case, the decision of that Court will be in accordance with its

decision in the *Memphis Cotton Oil* case, (59 F. (2d) 276/279-280) and contrary to the decision of the Court below. Thus, there still exists a conflict, despite this Court's affirmance in that case.

Even in *Factors and Finance Co.* v. *United States*, 56 F. (2d) 902, wherein the amendment of a claim was involved, the Court of Claims went out of its way to point out that, if the Commissioner of Internal Revenue is not misled as to the facts, but has all of the facts lacking on the face of the original claim, the reason for the rule requiring that such facts be presented therein ceases to exist, and the rule is no longer applicable.

So too is there a conflict between the decision below and the decisions of the District Court for the Eastern District of Pennsylvania, from which the Government has not appealed. In that district then, the law is exactly opposite from the law in the Second Circuit.

The District Court for the Eastern District of Pennsylvania has never wavered in its decisions, both before and after the decision in the *Memphis Cotton Oil* case. See *Union Trust Co.* v. *McCaughn*, 24 F. (2d) 459, *Wunderle* v. *McCaughn* 38 F. (2d) 258, and *Wellman* v. *United States*, 4 F. Supp. 155.

In the *Wellman* case, the last case decided by that Court, a decision from which the Government failed to appeal to the Circuit Court of Appeals for the Third Circuit, the Court pointed out that, while the form was never corrected, the examination of the facts for 1918, necessary to determine the tax liability for 1919, was such as to give the taxpayer to

understand that formal amendment was unnecessary. Such is the case here.

If there existed a conflict between the decisions cited in the Petition for a Writ of Certiorari, in the *Memphis Cotton Oil* case, and the decision therein sought to be reviewed, there exists one here, for the decision of the Court of Claims in that case, though affirmed on other grounds, still stands. Since this Court did not decide the question presented therein, and has not since decided the question, *the conflict in decisions must necessarily still exist.*

The instant case is unlike the cases of *Samara* v. *United States*, 129 F. (2d) 594, *Cudahy Packing Co.* v. *United States*, 126 F. (2d) 429, *Landrum* v. *Commissioner*, 122 F. (2d) 857, *Tennesse Consolidated Coal Co.* v. *Commissioner*, 117 F. (2d) 452, and *Lee Wilson and Co.* v. *Commissioner*, 111 F. (2d) 313. In all of those cases, the Commissioner gave the taxpayer every opportunity to produce the facts, and the taxpayer refused to do so. In the instant case, the taxpayer gave the Commissioner all of the facts, the claim was considered on the merits, and then was rejected (1) on the grounds that this claimant was not the taxpayer and (2) for defects of form.

The divergent opinions of the Courts on the meaning of the decision in the *Memphis Cotton Oil* case, with respect to the question left unanswered in that case, require a review by this Court of the decision below.

(3) The principles enunciated in *Tucker* v. *Alexander*, 275 U. S. 228, *U. S.* v. *Memphis Cotton Oil Co.*, *supra*, and *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, as a basis for the decisions therein.

are not reconcilable with those of the Court below. The philosophy of those decisions should be logically applied to the facts of the instant case, if there is to be a fair administration of the tax laws.

(4) A decision to the effect that taxpayers may not put their trust in Government officials—or be doomed to disappointment—in applying the principle that the United States may not be sued unless it consents, should not be permitted to control in any Circuit Court, especially in the presence of conflict on a question not yet decided by this Court. For 25 years, it has been the rule that "Men must turn square corners when they deal with the government." *Rock Island A. & L. R. R. Co.* v. *United States*, 254 U. S. 141, 143. It has never been previously admitted that taxpayers cannot expect similar and fair treatment from their Government—but must beware. The basic reasoning of the Court below in this respect is indeed an invitation to this Court to review the instant case.

The decision below ignores the reasoning of this Court in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, which is predicated on its decision in *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, in upholding Title VII of the Revenue Act of 1936. Surely, this Court did not mean to say that equitable principles were to apply only *against* the taxpayer-claimant.

The Petitioner herein could have cured the defect on the face of the claim, during the examination of the claim on the merits by the Deputy Collector, by filing the data which the Deputy Collector had, and which he eventually gave to the Petitioner. Is this

the sort of empty gesture, which the statute and this Court require, in the matter of a law based upon and interpreted according to equitable principles?

In true keeping with the principle so often followed by this Court, that the Commissioner must be advised of the true nature of the claim and of the facts in support of it—and when he has been so fully advised the conditions of the statute have been fully met—will not justice and the Congressional will better be served by a holding that, when a claim for refund may be remedied by amendment, if the Commissioner, through his agents, has in his possession all of the facts and basic data which would make a defective claim valid, if added to the claim, and has examined the claim on the merits, he is deemed to have waived defects in the form of the claim?

In the instant case, in the various claims filed by Angelus and Niagara (R. 11-39) in the joint returns filed by them, (R. 110-124) and in the examination of *both* claims on the merits (R. 40, 125-129, App. B), the Commissioner had in his possession all of the data lacking on the face of Petitioner's claim. He was not misled in any way. Then, when it was too late to amend, the Commissioner rejected the claim. The rejection on the grounds that Petitioner is not the taxpayer is a question of fact to be tried on the merits. The rejection, on the grounds of defects in the form of the claim should not be permitted, in the presence of the uncontroverted facts of this case. Good morals in dealings between the Government and taxpayers demands that, when a claim for refund has been considered on the merits,

as this claim was, and when the Commissioner has all of the basic facts lacking on the face of the claim, as he has in this case, any defect in the form of the claim is deemed waived.

CONCLUSION

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

PREW SAVOY,
Attorney for the Petitioner.

October, 1944.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY, *Petitioner*

vs.

JOSEPH D. NUNAN,
Commissioner of Internal Revenue

APPENDICES

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APPENDIX A

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII — REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. (7 U. S. C. 1940 ed., Sec. 623.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists

whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 1940 ed., Sec. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862]. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940,* a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 1940 ed., Sec. 645.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein,

* July 1, 1937, in Revenue Act of 1936

it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference

between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time, changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to

the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. 1940 ed., Sec. 649.)

Revenue Act of 1942, c. 619, 56 Stat. 798:[1]

SEC 510. ABOLITION OF BOARD OF REVIEW AND TRANSFER OF JURISDICTION TO BOARD OF TAX APPEALS.

(a) Effective as of the close of business on December 31, 1942, the Board of Review, established under section 906 (b) of the Revenue Act of 1936, is hereby abolished and the jurisdiction vested in said Board of Review is hereby transferred to and vested in the Board of Tax Appeals.

* * * * *

(c) All proceedings pending in the said Board of Review on December 31, 1942, shall be deemed pending in and be transferred forthwith to the Board of Tax Appeals, and shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein.

[1] The name of the Board of Tax Appeals was changed by Section 504 of the Revenue Act of 1942 to The Tax Court of the United States.

(d) All journals, dockets, books, files, records, and property, including office equipment of the said Board of Review, shall be transferred to the Board of Tax Appeals.

(e) Section 902 of the Revenue Act of 1936 (relating to conditions on allowance of refunds) is amended by striking out "Board of Review" and inserting in lieu thereof "Board of Tax Appeals (hereinafter referred to as the 'Board')".

* * * * * *

(7 U. S. C. 1940 ed., Supp. II, Sec. 648.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ARTICLE 601. *Claim form prescribed.*—Claims for refund of amounts paid as processing tax (as defined in section 913 (b) of the Act) shall be filed on P. T. Form 79. (See Chapter 11 of these regulations for general provisions relating to all claims.)

ART. 603. *Payment of tax.*—The claimant shall set forth in the claim complete data with respect to the amount of processing tax which he has paid on the processing of the commodity. Each claim shall show as to each month's processing of the commodity: (1) the total tax liability returned; (2) the total amount of tax paid on the first domestic processing of the commodity; (3) the date and amount of each payment and the month for which paid; (4) that part of the total amount paid which represented the processing of the commodity for a customer for a charge or fee ("custom processing tax," see Chapter V of these regulations); (5) that part of the total

amount paid which represented processing tax, as defined in section 913 (b) of the Act; and (6) the collector to whom each payment was made. In the case of tobacco the above data respecting tax payment shall be shown separately with respect to each market classification.

ART. 605. *Evidence as to margins.*—Section 907 of the Act provides that in claims for refund of amounts paid as processing tax it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin per unit of such commodity was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

There shall be submitted with, and as a part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax. (For definition of "tax period" and "period before and after the tax," see section 907 (c) of the Act.)

The average margin for the tax period shall be computed as follows: Determine for each month during the period (1) the gross sales value of articles derived from the commodity processed during such month; (2) the cost of the commodity processed during such month; (3) the amount of processing tax paid with respect to the quantity of the commodity processed during the month; and (4) the number of units of the commodity processed during the month. The sum of the monthly gross sales values for all months during the period minus the sum of the monthly costs of the commodity processed for all months during the period, minus the sum of

the processing tax paid for all months during the period, and divided by the sum of the number of units of the commodity processed during all the months comprising the period is the average margin for such period. (For definition of "cost of commodity" and "gross sales value," see section 907 (b), paragraphs (5) and (6), respectively, of the Act.)

The average margin for the period before and after the tax shall be computed in the same manner as the average margin for the tax period, except that the processing tax does not enter into the computation.

In determining the average margin for the tax period, the "number of units of the commodity processed" shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "cost of the commodity processed" shall be the cost of the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "gross sales value of articles" shall be the gross sales value of articles processed from the number of units of the commodity with respect to which the claimant actually paid the processing tax.

In support of such statement there shall be submitted, verified by appropriate affidavit, a detailed showing of the manner in which the margins for each month and the average margins for each period were ascertained, the data and records on which they were based, the location of such data and records, and all other related matters, including the accounting procedure of the claimant, which entered into the computations of such margins. All elements, factors, units, or measures entering into the computation of such margins, and any departure from uniformity in the use thereof in making such computation for any part of either period, must be fully explained and justified.

ART. 606. *Other evidence.*—In addition to the showing as to margins, the claimant is privileged to submit with his claim any other evidence available to him tending to establish that he bore the burden of the tax. Such evidence may be submitted to support the prima facie presumption, if such presumption is in favor of the claimant, or to rebut such presumption if it is against him. (See section 902 and subsection (e) of section 907 of the Act.)

APPENDIX B

Reprint of Pages 126-129 of Transcript of Record Due to Illegibility:

(126)

RAYMOND A. O'CONNOR, being duly sworn, deposes and says that he is a Certified Public Accountant of the State of New York; that he audited the books of account and records of Middleport Flour Mills, Inc., (now Angelus Milling Co., Inc.,) and also the books of Niagara Falls Milling Company; that between March 1, 1939, and March 22, 1939, he obtained photostatic copies of the working papers of the representatives of the Bureau of Internal Revenue, two members of which were named Troy and Lieben. The photostatic copies of the working papers of the representatives of the Bureau of Internal Revenue were obtained from the accountant for the trustee in bankruptcy of the Niagara Falls Milling Company.

Niagara Falls Milling Company and Middleport Flour Mills, Inc., (now Angelus Milling Co., Inc.,) had common officers and a common bank account from July 1, 1933, to January 6, 1936. Both Niagara Falls Milling Company and Middleport Flour Mills, Inc., (now Angelus Milling Co., Inc.,) also had a common set of books; and when the representatives of the Bureau of Internal Revenue in examining the claim of Angelus Milling Co., Inc., for a refund of its processing taxes in July, 1939, and in September, 1940, examined the books of the Niagara Falls Milling Company, they also examined the records of the Angelus Milling Co., Inc.

Deponent was unable to obtain the books of Angelus Milling Co., Inc., until about September, 1941, as they were in the custody of the Bankruptcy Court at Buffalo, New York. Deponent did, however, obtain the essential

figures from his partner, Jackson A. Lyon, who in turn obtained them from the representative of the Bureau of Internal Revenue, J. Bernard Lieben. A copy of the Affidavit of deponent's partner, Jackson A. Lyon, accompanies deponent's affidavit.

Deponent knows of his own knowledge that representatives of the Commissioner of Internal Revenue investigated the claim for refund of Angelus Milling Co., Inc., on its merits and sent Angelus Milling Co., Inc., a formal rejection of the claim on May 24, 1941. Deponent further states that he is President of both Niagara Falls Milling Co., Inc., and Angelus Milling Co., and knows of his own knowledge that the government has offered

the Niagara Falls Milling Company in bankruptcy a refund of $51,000.00 for processing taxes illegally collected, subject to offsets of $41,000.00. In this offer of refund are included the tax payments made by Angelus Milling Co., Inc.; and had the claim of the Niagara Falls Milling Company not included the claim of the Angelus Milling Co., Inc., no refund whatsoever would be due Niagara Falls Milling Company. Deponent is also one of the largest creditors of the Niagara Falls Milling Co., Inc., in bankruptcy.

Deponent further states that of his own knowledge he knows that on November 18, 1938, there was addressed to Mr. Harry Dickinson of Lockport, New York, the then President of Angelus Milling Co., Inc., the following letter

Treasury Department
Internal Revenue Service
Buffalo, N. Y.

Office of
Internal Revenue Agent in Charge
200 U. S. Courthouse, Niagara Square
Buffalo Division

November 18, 1938

Mr. Harry Dickinson
Lockport, N. Y.

Sir:

In connection with the investigation of Claim for refund under Title VII, Revenue Act of 1936—Claim F5899, you are requested to allow examination of the following records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc.:

General Ledgers of both corporations
for the years 1935 and 1936
Minute Books of both corporations

In view of the fact that the investigation will be completed

within the next few days I would request that these records be made available to me on Monday, November 21, at Room 1011, White Building, Buffalo, N. Y.

Respectfully,

J. Bernard Lieben
General Deputy Collector.

JBL:E

Deponent furnished J. Bernard Lieben the information he requested on November 21, 1938, at Buffalo, New York.

(Signed) RAYMOND A. O'CONNOR.

Subscribed and sworn to before me this eighth day of February, 1943.

(Signed) (Mrs.) ALICE S. BAIRD,
Notary Public.

(129)

JACKSON A. LYON, being duly sworn, deposes and says that he is a Certified Public Accountant of the State of New York and that on behalf of Middleport Flour Mills, Inc., (now Angelus Milling Co., Inc.,) be held conferences on September 4, 5, 6 and 7, 1940, with representatives of the Bureau of Internal Revenue with respect to the Claim for Refund of Processing Taxes filed with the Bureau of Internal Revenue on or about August 15, 1938.

There were four or five representatives of the Bureau of Internal Revenue present at the conference, one named Troy who was a native of Colorado and is now, so deponent is informed, in business in Atlanta, Georgia, and another, so deponent is informed, by the name of J. Bernard Lieben was a Deputy Collector in the Office of the Collector of Internal Revenue in New York City.

Deponent further states that in the four days' conferences the representatives of the Commissioner of Internal Revenue investigated fully the merits of the claim of Angelus Milling Co., Inc., for its refund of processing taxes illegally collected.

(Signed) JACKSON A. LYON.

Subscribed and sworn to before me this 8th day of February, 1943.

(Mrs.) ALICE S. BAIRD,
Notary Public.

APPENDIX C

The United States vs. Memphis Cotton Oil Company

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1932

No. 308

THE UNITED STATES, *Petitioner*,

v.

MEMPHIS COTTON OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case rendered May 31, 1932, but not yet officially reported.

QUESTION PRESENTED

Whether the respondent may maintain a suit for the refund of 1922 and 1923 taxes where the only claims for refund filed contained no statement of the grounds relied upon but where the Commissioner, through a report of the revenue agent, learned facts which if presented in a claim should have caused a refund. The claims were duly filed. The report reached the Commissioner after

the expiration of the period for filing a claim for refund of the 1922 taxes but before the expiration of the period for filing a claim for the 1923 taxes.

STATUTES AND REGULATIONS INVOLVED

R. S. 3228 (a) as reenacted in section 1012 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 342, provides:

> "SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the revenue act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum."

R. S. 3226 as reenacted in section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides:

> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing of such claim unless the Commis-

sioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 284 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides in part as follows:

"Sec. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this act, * * * the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

"(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

"(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund."

Article 1036 of Regulations 62, promulgated under the Revenue Act of 1921, provides in part:

> "*Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath."

Similar regulations have been in force under all the income tax acts.

STATEMENT

Respondent sued in the Court of Claims to recover overpayments of income taxes for the years 1922 and 1923 amounting to $6,496.46. The respondent found the facts as follows:

The respondent paid the last installment of its 1922 taxes on December 7, 1923. It overpaid this tax in the amount of $1,660.70. The respondent paid the last installment of its 1923 tax on December 6, 1924. It overpaid this tax in the amount of $4,835.76.

A timely claim for refund for 1922 was filed on June 30, 1927. The claim specified no grounds but stated as follows:

> "Deponent verily believes that this application should be allowed for the following reasons:
> "The statement attached hereto shows—

1.	That the amount of tax paid for this year was	$25,626.25
2.	And that the correct amount of tax due was	24,296.56
3.	And there was overpaid in error	$ 1,329.69
4.	Refund of which is requested and with interest as provided by law.	

"The statement attached to this claim by the plaintiff stated as follows:

Net income per books	$159,836.71
Taxable net income	194,372.46
Difference	$ 34,535.75

Computation of Tax

Net income	$194,372.46
12½ per cent	24,296.56
Previously paid	25,626.25
Overpaid	$ 1,329.69

On the same day a timely claim for 1923 was filed by the respondent in form identical to that used in the 1922 claim with no statement of the grounds relied on. No further claims were ever filed by the respondent.

The matter was referred by the Commissioner to the revenue agent in the respondent's district to examine the respondent's books and make a detailed report to the Commissioner. This report was received by the Commissioner on February 7, 1928, before the expiration of the time for filing claims for refund in 1923 taxes but after the expiration of the time during which respondent might have filed a claim for refund of 1922 taxes. This report showed that the respondent had been overassessed. The Deputy Commissioner then wrote the respondent that a certificate of overassessment would issue in due course. Later, after further examination, the Deputy Commissioner wrote the respondent that as no evidence had been filed to support the general claims filed by the respondent the claims would be rejected. In due course, on October 23, 1929, the respondent's claims for refund of 1922 and 1923 were rejected on the ground that they were not sufficient under the statute and that, therefore, allowance and refund of the overpayments for 1922 and 1923 were barred by the statute of limitations.

SPECIFICATION OF ERRORS

1. The Court of Claims erred in holding that a timely claim for refund specifying no grounds may support a suit for refund of taxes because the Commissioner, through a revenue agent, learned that an overpayment had been made by the respondent.

2. The Court of Claims erred in giving judgment for the respondent.

REASONS FOR GRANTING THE WRIT

1. The United States has filed a petition for a writ of certiorari to the Court of Claims in a similar case, No. 141, *The United States* v. *Factors & Finance Company*. The Court of Claims decision in the instant case is based upon its earlier decision in the Factors & Finance Company case. The authorities cited by the Government in that petition, as conflicting with the Court of Claims decision, are also in conflict with the present decision. The questions presented by the two cases are similar. They arise under the same statutory provisions and are of equally great importance in the administration of the revenue acts.

2. The decision in the instant case is an extension of the doctrine laid down by the Court of Claims in the Factors & Finance Company case. In the instant case the taxpayer never filed any paper specifying the nature of its claim for refund. The Commissioner's knowledge of grounds on which a claim might have been based came solely through his own agents. As to one of the taxable years in question that knowledge reached the Commissioner at a date when the period for filing a claim for refund of taxes for that year had expired. As to both years the taxpayer entirely failed to follow the statutory requirements that the facts relied upon in support of the claim should be clearly set out. If the decision of the Court of Claims in the instant case is correct, the strict requirements of the statute that claims for refund be filed by taxpayers are almost entirely abrogated. In such

an event a taxpayer who had filed a general claim within time could secure a refund if entirely without the taxpayer's knowledge the Commissioner had learned that an overpayment of taxes had been made by him.

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

August, 1932.
[Title and index omitted.]

FILE COPY

No. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY, *Petitioner*

vs.

JOSEPH D. NUNAN,
Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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JOSEPH D. NUNAN,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

1. Preliminary Statement

The position of the Respondent, in its brief in opposition, in its statement of the case, and in its statement of the question presented, as well as in its argument respecting the importance of the question involved and the conflict of decisions, in the face of its own Petition for a Writ of Certiorari, in *United States* v. *Memphis Cotton Oil Company*, 288 U. S. 62, can not be justified.

When this Court upheld the statute involved herein, in *Anniston Mfg. Co.* v. *Davis*, 301, U. S. 337, the decision was based on the equity which this Court believed to be inherent in the statute—equitable principles applied *against* the taxpayer's contentions. Petitioner has urged (Pet. pp. 22-23) that these equitable principles, properly applied, require that the Government, after a claim has been examined on the merits, be not permitted to lead a taxpayer beyond the statutory period of limitations, when it can then shamelessly rely on a technicality, which could have been readily cured earlier, to the irremedial loss of the taxpayer.

To this the Court below replied:

> "It makes no difference to the taxpayer what was his mistake; . . . he awakes to learn that it is never safe to put his trust in officials. . . . The result is often extremely harsh, as this case shows; but he who deals with the government must dot his i's and cross his t's; and if he assumes that he may rely upon the ordinary rules which apply as between individuals, he is doomed to disappointment."

Indeed, this is a sad commentary on our system of justice, the law and equity, if this is true.

Taking its cue from this view of the fairness which exists in dealings between the Government and its people, Respondent has begged the question, instead of stating it, has stated the facts so that inferences contrary to the facts known to it to be true may be drawn, and has deliberately argued against

the reasons for granting the writ, contrary to the facts and the law.

2. Question Presented

The question presented is:

Whether the Petitioner may maintain its suit for refund (on the merits), where the claim for refund contained the nature of the claim but not the data in support thereof, and where the Commissioner, through an examination of the claim on the merits by a deputy collector, learned the facts and obtained the basic data which, if presented in the claim, should have caused a refund. (Pet. p. 3.)

This is the very question which was presented in *United States* v. *Memphis Cotton Oil Co., supra,* (App. C, p. 17) (and which went unanswered, p. 73) as this Court will see from Appendix C.

Respondent, to avoid this embarrassment, has stated the question, as follows:

> "Whether the Tax Court erred in dismissing the proceeding for lack of jurisdiction where the petitioner's claims for refund of processing taxes failed to comply with the requirements of Section 903 of the Revenue Act of 1936, as amended, and applicable Treasury Regulations promulgated thereunder or the information called for on Form P. T. 79, and such defects had not been waived by the Commissioner of Internal Revenue." (Resp. Br., p. 2).

The statement of the question presented—as set forth by the Respondent—obviously begs the ques-

tion—for the question *is*—did the Commissioner in effect waive the defects of the claim, on the facts known to Respondent and presented below, and *not*—is the case to be dismissed, because the Commissioner failed *actually and in terms* to waive the defects of the formal claim.

The question may be restated, as follows:

Congress imposed a tax (whether called a processing tax, a manufacturer's tax, an excise tax, or anything else), which was declared to be unconstitutional. Congress then imposed the condition to any refund that the taxpayer-claimant prove that he sustained the economic burden of the tax, under regulations to be prescribed by the Treasury Department. In the formal claim for refund filed, petitioner failed to comply with all of the requirements respecting the proof that it sustained the economic burden of the tax, *but* it did so when the claim was examined on the merits, *before* the statute of limitations had run, the respondent at no time complaining of the defect in the claim. *After* it was too late to amend—respondent rejected the claim, partly on the merits, not involved herein, and partly on the technical ground that the formal claim was deficient. The simple question then is—does the examination of the claim on the merits, under the circumstances set forth in detail in the Petition for a Writ of Certiorari, constitute a waiver of the defects in the claim, or may the Government prolong investigations and reviews, until it is too late to amend, so that the claimant who sustained the burden of the tax may not prove that fact and obtain the refund?

If the answer is that the Commissioner of Internal Revenue may thus cut off proof on the merits, whether inadvertently or intentionally, equity jurisprudence has failed in its purpose, and the principles upon which *Anniston Mfg. Co.* v. *Davis*, supra, is based are quite meaningless, except to cut off the rights of an uninformed taxpayer.

Nowhere in its brief in opposition does respondent deny, even by inference, that the Commissioner, at the time of the rejection, had all of the data and knew all of the facts which he would have had and known, had the claim been complete, or had the claim been amended so as to make it complete prior to its rejection. This fact, asserted by petitioner, may then be deemed to be true. The question then is—did the Commissioner waive the defects of the claim?

3. Statement

In commenting upon the claims filed by Petitioner, Respondent has called attention to the fact that the claims on Form 843 (R. 11-19), and the claim on Form 79 (R. 20-29), attached to the Petition as Exhibits, are *unsigned*. (Respondent's Brief, p. 5, line 5, p. 6, line 1.) The natural inference is that these claims were never properly signed. The fact is, of course, that the original claims, properly signed, are in Respondent's files.

Respondent then goes on to say about the claim (Resp. Br., p. 6, lines 6-9):

> "It does not purport to be a claim by or on behalf of the petitioner for any amount and does

not indicate that any part of the amount claimed had been paid by petitioner."

Respondent knows that petitioner and Niagara Falls Milling Company had a common set of books, common officers (R. 125) and a common bank account. Respondent has known this since 1933. (R. 113.) It knew it in 1938. (R. 127.) Respondent has known that Petitioner was a processor of wheat, and, as such, *liable* for the processing tax, since 1933. (R. 113.) Respondent has known that petitioner has claimed a refund of tax paid since 1936. (R. 11.) Whether petitioner was the taxpayer, by reason of the payment of tax for which it was liable, out of its common bank account, by a common officer, is a question of fact to be proved on the merits. Knowing the facts, it is indeed with bad grace that respondent continues to inject this question, when the courts below ignored it. It can only be for the sake of raising inferences that will cloud the issue presented and make the case look the more complicated.

At page 13, Respondent cites numerous decisions to the effect that a claim for refund must be filed by the person liable for, and who paid, the tax. Admittedly. Well, petitioner filed returns, and when it did not, they were filed for it, and the tax was paid out of its monies, from a joint account, by an officer of two companies. It was liable for tax and paid it. Respondent contends otherwise, but petitioner is prepared to prove the facts in a trial on the merits. Are these assertions and innuendoes, by respondent, to

preclude petitioner from such a trial, all in the name of Government?

4. Reasons for Granting the Writ

(a) *The question involved DOES present a question of importance in the administration of the revenue laws.*

Respondent has denied this assertion on the grounds (1) that the requirements of the statute involved are not necessary in the *ordinary* claim for refund of other revenue taxes and (2) that the decisions below are based upon the failure of the petitioner to present the necessary and required date in support of its claim. Respondent then goes further to say that the question has already been resolved against the petitioner by this Court, in *United States* vs. *Memphis Cotton Oil Co., supra.*

Not one of these assertions is true, nor do they approach a correct and fair statement, without qualifications that would make the statements, when analyzed, absurd.

Title VII of the Revenue Act of 1936, was an enlargement of Section 21(d) of the Agricultural Adjustment Act of May 12, 1933, as amended by Section 30, Public 320, 74th Congress, August 24, 1935, which in turn, was an adaptation of Section 424 of the Revenue Act of 1928.

Since 1928, there have been *substantially* similar statutory requirements that, to support a refund, the taxpayer must prove he sustained the economic burden of the tax. Such requirements still exist as to retailers' excise taxes, in section 2407 (b) of the In-

ternal Revenue Code, and as to manufacturers' excise and import taxes, in section 3443 (d) of the Code.

Again, the Commissioner is applying the very same requirements in connection with claims for refund of excess profits taxes, of which there are thousands, under Section 722 of the Code. See *Blum Folding Paper Box Company*, awaiting decision of the Tax Court of the United States, docket 5854.

Finally, whether or not the statute involved contains the specific requirements involved herein, any claimant for refund must, with the claim *or* later, submit all of the data upon which he relies. In substance, there is, in reality, no difference in the total requirements of a claimant for refund, under the decisions, whether the claim be for the refund of processing tax or of income tax. The only reason for respondent's making a distinction here is because the Courts generally have had an abhorrence of processing tax cases.

The Court below did not base its decision on Petitioner's failure to present "the necessary data in support of its claim." It based its decision on Petitioner's failure to do so *at the time the claim was filed*. The fact is that Respondent actually had every bit of the required data, at the time of the rejection, and Respondent has never denied this to be the fact. It is this fact which Petitioner urges has cured the defects in the formal claim. The consideration of the claim on the merits, the Commissioner having all of the data which the claim lacked, prior to the running of the statute of limitations, is petitioner's

basis for asserting that any defect in the formal claim was waived.

The question so presented was *not* resolved in *United States* v. *Memphis Cotton Oil Co., supra,* as the last sentence in the opinion of this Court clearly shows. The Court below was wrong if it so asserted. This question was left unanswered. It should be answered now, in *this* case.

Respondent, in the *Memphis Cotton Oil* case, represented to this Court that this question was of great importance *in 1932.* (App. C, p. 22.) It is still of importance, whether a processing tax, or an income tax, be involved. For respondent to urge otherwise lacks every element of fairness to a particular taxpayer, in a case it has won, instead of losing, and of frankness to this Court.

What makes the question of less importance, when taxpayer petitions than when the Solicitor General does?

(b) *There IS an actual conflict of decisions of the Courts which this Court should resolve.*

Again, respondent gives several reasons for denying this assertion, namely: (1) the cases relied upon do not involve the processing tax; (2) in the cases cited, by petitioner, there was a waiver of the claim, or "all the facts were before the Commissioner," (Resp. Br., p. 16); (3) the claim was decided on the merits and the Commissioner had determined the amount of the over-payment; and (4) there is no conflict to be based on the Court of Claims' decision in *Memphis Cotton Oil Co.* v. *United States,* 59 F. 2nd 276. (Resp. Br., p. 15.)

The fact that the cases relied upon involve income tax and not the processing tax is of no significance. The question is far broader. The issue is—given the facts of this case—irrespective of the kind of tax involved—has the Commissioner waived the formal defects of the claim filed? If he has, the claimant is entitled to a trial on the merits.

Secondly, all of the facts and all of the data were before the Commissioner. While the Commissioner did not say—"I waive the defects in the claim"—he had all of the facts, and he considered the claim on the merits. That is obvious from the fact that he held that petitioner was not the taxpayer, as well as from uncontradicted affidavits. (Tr. 126-129, App. B.) These facts, in and of themselves, constitute a waiver similar to the waivers in the cases cited in the Petition. (pp. 18-19.)

The instant claim was considered on the merits. The fact that the Commissioner did not find the amount of overpayment, in the instant case, is of no more significance than the fact that he did not do so, before the *Memphis Cotton Oil Co.* case went to the Court of Claims. The existence or non-existence of this fact has not been of significance in any of the cases previously decided against the Government.

Finally, the *Memphis Cotton Oil* case, as decided by the Court of Claims, is in direct conflict with the decision below. No clearer conflict could exist. The statement of Respondent to the contrary (Br., p. 15) could be justified, only if the decision had been reversed. True, the decision was affirmed on other grounds. However, until it is reversed, that decision

stands as the law in the Court of Claims, whether or not the Government acquiesces in it. That will be the law in the Court of Claims, just as the decision below will be the law in the Circuit Court of Appeals for the Second Circuit, until this Court resolves the question. The affirmance on other grounds, in the *Memphis Cotton Oil* case, might take away some of the force of the decision in the Court of Claims, if this Court had not said that the question decided by the Court of Claims was not being decided by it. (p. 73.) Even then, however, the law of the Court of Claims would still be in direct conflict with the views of the Court below, which treated this Court's decision in the *Memphis Cotton Oil* case as though the question decided by the Court of Claims had been decided by this Court, and as though the decision of the Court of Claims had been reversed.

There is a conflict today, if there was one in 1932, when the Government filed its Petition for a Writ of Certiorari in the *Memphis Cotton Oil* case (App. C.) There *is* a conflict of decisions, the Government's argument to the contrary, notwithstanding.

CONCLUSION

It is respectfully submitted that the question involved herein is of great general importance and that the decisions of the courts are in conflict. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PREW SAVOY,
Attorney for Petitioner.

December, 1944.

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No. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY, *Petitioner*

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The first decision of the United States Processing Tax Board of Review of January 20, 1942 (R. 71), and its second decision of August 5, 1942, together with supporting and dissenting memoranda (R. 80), denying Respondent's motions to dismiss, are not reported. The opinion of the Tax Court of the United States (R. 91) is reported as 1 T. C. 1031.

The opinion of the Circuit Court of Appeals (R. 133) is reported at 144 F. (2d) 469.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1944 (R. 139). The petition for a writ of certiorari was filed on October 18, 1944, and was granted on December 4, 1944. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Petitioner may maintain its suit for the refund of processing taxes, where the claim for refund contained the nature of the claim, but not the data in support thereof, and where the Commissioner, through an examination of the claim on the merits, by a deputy collector, learned all of the facts and obtained all of the basic data, which, if presented in the claim, would have been an adequate basis for allowing a refund.

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of the statutes and regulations involved are presented in Appendix A of the "Appendices," pp. 1-12, printed as a separate document and filed with the Petition for the Writ of Certiorari.

STATEMENT OF CASE

The facts are, as follows:

This case involves a claim for the refund of $145,-839.12, paid as processing tax on wheat, under the Agricultural Adjustment Act of May 12, 1933, as amended, declared unconstitutional in *Butler* v. *United States*, 297 U. S. 1.

The proceeding was initiated August 20, 1941, before the United States Processing Tax Board of Review (R. 7), for a review of the disallowance by the Commissioner of Internal Revenue, under date of May 23, 1941 (R. 40), of the Petitioner's claim for refund (R. 11-39).

The disallowance was based on two grounds: (1) that Petitioner was not the taxpayer, and (2) that the claim filed was not complete, in accordance with the statute and Treasury regulations. (R. 40.)

On October 4, 1941, Respondent filed a Motion for Better Statement of Claim (R. 42). On November 21, 1941, Petitioner filed an Amendment to Petition in Response to Motion for Better Statement of Claim (R. 49), having in the interim been given copies of Petitioner's Processing Tax Returns by the Commissioner, who had therefore refused to deliver such copies to Petitioner's counsel, on the ground that they were the returns of Niagara Falls Milling Co.

On November 26, 1941, Respondent filed a Renewal of Motion for Better Statement of Nature of Claim to apply to Petition as amended (R. 54). At the argument on the Motion, Petitioner was allowed to amend the Petition, and filed an Amended Petition December 29, 1941 (R. 63). The Respondent's

Motion was then denied, January 20, 1942. (R. 71.)

On February 16, 1942, Respondent filed a Motion to Dismiss, on the grounds that the claim filed was invalid, because incomplete, and that Petitioner was not the taxpayer, so that the Board lacked jurisdiction to review the Commissioner's disallowance of the claim for refund. (R. 72.) This motion was dismissed, after argument and the submission of evidence, on August 5, 1942 (R. 80), and on August 21, 1942, Respondent filed an Answer. (R. 82.)

On October 22, 1942, the Appeal was set for a hearing on the merits to be held on February 8, 1942. (R. 5.)

On October 21, 1942, the Revenue Act of 1942 became a law. Under Section 510 thereof, the life of the United States Processing Tax Board of Review terminated December 31, 1942, and The Tax Court of the United States thereafter had jurisdiction of all cases of that Board in their then *status*. (App. A, pp. 7-8.)

On January 29, 1943, Respondent filed a second Motion to Dismiss on Jurisdictional Grounds, this time with The Tax Court. (R. 86.) The Tax Court heard arguments thereon, received evidence, and on May 4, 1943, granted Respondent's Motion. (R. 91, 98.)

Petitioner thereupon, on July 27, 1943, filed a Petition for Review by the United States Circuit Court of Appeals for the Second Circuit (R. 99). That Court, on July 24, 1944, affirmed the decision of The Tax Court. (R. 133, 139.)

From the date of the filing of the Petitioner's claim for refund to the date of its disallowance, in-

cluding the examination of the claim on the merits by the Deputy Collector, the Commissioner contended *only* that Petitioner was not the taxpayer, and that Niagara Falls Milling Co. was the taxpayer. This being a fact to be proved at a trial on the merits, since Petitioner had alleged that it was liable for and had paid the processing tax, the Processing Tax Board of Review, The Tax Court, and the Circuit Court of Appeals accepted Petitioner's allegations on the subject as true and refused to dismiss on such ground.

The rejection of the claim by the Commissioner was also based on the ground that the claim for refund *on its face* was invalid, because incomplete and not in accordance with the statute and the pertinent Treasury regulations.

The question of a defect in the claim had never been raised *before* the Commissioner's letter of disallowance, and before Petitioner had refused to withdraw its claim to permit the Commissioner to make a settlement with Niagara Falls Milling Co., (R. 126-127, App. B, pp. 13-14), *after* the claim had been examined on the merits, and *after* the Commissioner had obtained all of the data lacking on the face of the claim. Several days were spent by representatives of the Commissioner examining the merits of the Petitioner's claim, and the question of a defect in the claim was never there raised. (R. 126-129, App. B. pp. 13-16.)

The usual letters, written all other claimants, requesting supplemental information and permitting its filing, to cure defects on the face of the claim, were never sent this Petitioner. (R. 66.)

On the date on which the claim was rejected, the Commissioner, as a result of the examinations made by his agents, had in his possession all of the data lacking on the face of the claim, (R. 126-127, App. B, pp. 13-16).

Had the Petitioner, on the day before the letter of rejection, gone through the futile gesture of amending the claim, incorporating therein the very facts and data then in the hands of the Commissioner, the Commissioner could not have questioned the defect in the claim, under decisions of this Court on that question, *infra.* pp. 30-31.

The reasons for not requesting supplemental information, and the reasons why any formal defect in the claim has been waived, and thereby cured, will be obvious from the facts brought to the attention of the Processing Tax Board of Review, The Tax Court, and the Circuit Court of Appeals.

The facts which follow, whether sworn to or supported by evidence filed, have never been controverted by other facts, because they are true and are known to be true by the Commissioner.

They are:

Petitioner is a corporation, organized and existing under the laws of the State of New York, with its principal office at Niagara Falls, New York. On June 13, 1933, the name of Petitioner was changed from "Middleport Flour Mills, Inc." to "Angelus Milling Company, Inc." Since that date, Petitioner has been known as "Angelus Milling Company, Inc." and "Middleport Flour Mills," the name "Angelus" connoting the brand of flour, and the name "Middle-

port" designating the locale of one of the flour mills. (R. 63.)

During the period July 9, 1933, to January 6, 1936, both dates inclusive, Petitioner was a processor of wheat, (R. 63), and, as such, liable for the processing tax.

Niagara Falls Milling Co., Inc., hereinafter called "Niagara," is a corporation, organized and existing under the laws of the State of New York. During the period July 9, 1933, to January 6, 1936, both dates inclusive, Niagara was a processor of wheat, (R. 63), and, as such, liable for the processing tax.

During the period July 9, 1933, to January 6, 1936, Niagara and Angelus had one and the same majority stockholder, a common President, a common set of officers, including a common Secretary (later Vice President), one J. W. Schwan, who signed all tax returns and checks in payment of tax, a common set of books of account, a joint bank account, and the same employees. (R. 66.)

When the flour of Petitioner was manufactured and sold, Petitioner was charged with the cost of wheat and the cost of manufacture, overhead, etc., and was credited with the selling price. The same procedure was followed with respect to the wheat and flour of Niagara. (R. 32, 33, 96.)

For the period July 9, 1933, to January 31, 1935, *joint returns*, on account of the processing of wheat by Petitioner and Niagara, at the mill at Lockport, were filed with the Collector of Internal Revenue for the *28th District* of New York (R. 110, 113-120), and tax in the sum of $324,016.25, was paid him on account of such processings. (R. 63-64.)

For the period February 1, 1935, to November 30, 1935, returns were filed, in the name of Niagara, on account of the processings of wheat by both Petitioner and Niagara, at the mill at Lockport (R. 110-111, 121) and at the mill at Middleport (R. 111, 123), with the Collector of Internal Revenue for the 28th District of New York, and tax, in the sum of $110,-029.02, was paid him on account of such processings. (R. 64.)

All of the foregoing returns were kept in one file in the Bureau of Internal Revenue, where counsel for Petitioner obtained them, after the filing of the Petition with the Processing Tax Board of Review, the files of the two corporations being together in said Bureau, in the custody of the same person.

Of the aforesaid sums paid as processing tax on wheat, the following amounts were paid said Collector, on the dates below set forth, on account of the processings of wheat by Petitioner, listed below, out of monies belonging to Petitioner, (R. 64-65):

Date	Units Processed (in bushels)	Tax Paid
1933		
July-August	19,505	$ 862.02
September	20,619	3,489.05
October	24,368	5,447.69
November	21,728	6,185.57
December	26,067	7,728.11
1934		
January-February	63,797	15,991.82
March	18,471	9,933.35
April-May	52,888	16,866.78
June	28,144	8,663.05
July	21,920	8,866.82
August	35,475	8,696.02
September	27,674	8,947.71
October	27,438	9,140.43
November	22,459	9,078.89
December	36,091	7,585.26
1935		
January-February	44,248	13,862.57
March-April	47,597	13,864.29
May	39,009	9,549.69
June	21,237	6,279.70
July	21,143	5,563.14
August	24,998	4,034.66
September	32,852	5,274.70
October	30,187	840.67
	706,906	$186,751.99

On or about June 23, 1936, *joint claims for refund* were filed, on Form 843, by *"Niagara Falls Milling*

Co., Inc., and/or Middleport Flour Mills, Inc." with the Collector of Internal Revenue for the *28th District* of New York, for the refund of processing taxes on wheat paid by Petitioner and Niagara, in the total sum of $454,045.27 (Exhibit A-1, A-2 and A-3, attached to the Petition), (R. 11-19), paid to him on account of the processing of wheat by them. These claims, as all other claims filed on Form 843, were disregarded, while the decision in *Butler* v. *United Stats, supra,* was being awaited for several months thereafter, and finally, after the passage of the Revenue Act of 1936, as all such claims were thereafter required to be filed on P. T. Form 79.

On or about June 30, 1937, Niagara filed a claim, on P. T. Form 79, for the refund of processing tax on wheat, in the sum of $436,231.73, with the Collector of Internal Revenue for the *28th District* of New York, paid to him on account of the processings of wheat by Niagara and by Petitioner. *This claim was complete on its face,* and contained *margin data* taken from the common books of account of Niagara and Petitioner. (Exhibit B attached to the Petition.) (R. 20-29.)

On or about August 15, 1938, Petitioner filed a claim, on P. T. Form 79, for the refund of $145,839.12, paid out of its monies, on account of the processings of wheat by it, with the Collector of Internal Revenue for the *28th District* of New York, designating this claim as "*Amendment to Claim.*" (Exhibit C attached to the Petition) (R. 30-39), and showing Petitioner's interrelationship with Niagara. (R. 32-33.)

Schedule A, which contained the volume of sales

made and the taxes paid, on account of processings of wheat by Petitioner and Niagara, bore the following caption—(R. 32):

> "Allocation of Refund Due Niagara Falls Milling Company and Middleport Flour Mills, Inc. (Now Angelus Milling Co., Inc.)"

There followed an explanatory statement respecting the two corporations and the allocation to be made of the refund of taxes claimed. (R. 32-33.)

Under date of November 18, 1938, the Internal Revenue Agent in Charge of the Internal Revenue Service at Buffalo, New York, the *28th Collection District* of New York, through a General Deputy Collector, in connection with the investigation of the claim of Niagara, sent to Mr. Harry Dickinson, the President of both Petitioner and Niagara, the following letter:

> "In connection with the investigation of Claim for refund under Title VII, Revenue Act of 1936—Claim F5899;[1] you are requested to allow examination of the following records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc.:
>
> General Ledgers of both corporations for the years 1935 and 1936.
> Minute Books of both corporations.
>
> "In view of the fact that the investigation will be completed within the next few days I

[1] Claim of Niagara (R. 20-29)

would request that these records be made available to me on Monday, November 21, at Room 1011, White Building, Buffalo, New York.

Respectfully,

J. BERNARD LEIBEN,

JBL:E *General Deputy Collector.*"

(R. 125, App. B, p. 15.)

This letter was occasioned by the fact that the *Commissioner's agent* knew, from the returns filed, taxes paid, and claims filed, all in the same collection district, that Middleport, Angelus and Niagara were interrelated. The Commissioner also knew, as this letter indicates, that the two companies had a set of books of account, a bank account, and officers, which required an examination in connection with the claim of either. Naturally, they were one and the same.

On or about September 4, 5, 6, and 7, 1940, the aforesaid J. Bernard Lieben, Deputy Collector of Internal Revenue, *28th District* of New York, and other representatives of Respondent, conferred with the accountant for Petitioner, respecting Petitioner's claim for refund, fully investigating said claim, and as a result of such conference and examination, obtained, from the common books of account of Petitioner and Niagara, all of the basic data and figures required to complete Petitioner's claim. (R. 126-129, App. B, pp. 13-16.)

Consideration of Petitioner's claim on the merits was, therefore, the natural result of the Bureau's examination of Niagara's claim and of the common books of account and bank account of the two com-

panies, which followed Lieben's letter of November 18, 1938.

Under date of May 23, 1941, the Commissioner of Internal Revenue, without having at any time requested from Petitioner any additional information, *in view of the complete information in his possession, a copy of which was obtained by Petitioner's accountant,* (R. 126-129, App. B, pp. 13-16), and without the usual conferences in Washington, granted in every other such known claim (pp. 32-33, infra), in a letter sent by registered mail, disallowed the claim for refund of Petitioner filed August 15, 1938, in its entirety (Exhibit D attached to Petition) (R. 40), relying on a technicality, *and for the first time complaining of the invalidity of the claim for refund, because incomplete.*

On that date, while *the books* of Petitioner and of Niagara were involved in bankruptcy proceedings involving Niagara (R. 126-129, App. B, pp. 13-16), they had at all times been available to the Commissioner, and he had obtained therefrom all of the data which the claim of Petitioner lacked.

Prior to filing a petition for a review of the disallowance of the claim for refund by the Commissioner with the Processing Tax Board of Review, counsel for Petitioner sought to obtain from the Commissioner copies of the processing tax returns of Petitioner and Niagara. Such copies were refused Petitioner's counsel, for the reason given that they were in the file of Niagara and not in that of Petitioner. Counsel finally obtained such copies and filed them with the Board, in connection with Re-

spondent's Motion for Better Statement of Claim. (R. 47, 110-111, 113-124).

The foregoing facts, none of which can in good faith be denied—the filing of joint processing tax returns, the filing of joint and several claims for refund and of separate claims for refund, the separate claim of Niagara being complete, the separate claim for refund of Petitioner, while not complete, showing the interrelationship with Niagara, the Bureau procedure as to these returns and as to the claims for refund, all in the same Collection district, the examination by the Commissioner of the claims for refund of both Niagara *and* Petitioner, on the merits, and the obtaining by the Commissioner of the basic data lacking on the face of the claim of Petitioner, definitely show:

1. That, from 1933 to 1936, and 1937 to 1941, the Commissioner knew of the interrelationship of Niagara and Petitioner.

2. That an examination of Niagara's claim for refund on the merits, which claim contained Petitioner's basic data, was a practical impossibility without also examining Petitioner's claim for refund on the merits.

3. That Petitioner's claim for refund was examined on the merits, in 1940, at which time the Commissioner obtained all of the data not supplied on the face of the claim, which data supported the refund.

4. That, if all of the claims for refund filed be considered together, Petitioner's claim is not defective, as Niagara's claim contains all of the margin data required.

5. That, in any event, the Commissioner waived every defect in Petitioner's claim for refund, regardless of his letter of disallowance, and regardless of the fact that the usual hearings or opportunity to supplement the claim were not accorded Petitioner, by examining Petitioner's claim on the merits and obtaining all of the required data lacking on the face of the claim.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In failing to hold that, having examined Petitioner's claim for refund on the merits, and having obtained all of the margin data lacking on the face of the claim, the Commissioner waived any defect in Petitioner's claim.

2. In holding that, after Petitioner had filed a timely claim for refund, which was considered on the merits, the Commissioner, by such an examination, which resulted in his obtaining all of the data lacking on the face of the claim, did not waive any defect in the form of the claim, but the Petitioner was required, even then, to amend as to any defect in the form of the claim, before its rejection.

3. In holding that, in dealings with Government officials, Petitioner could not rely upon the same rules of equity, justice and fairness which apply as between individuals, but could be misled into not amending a claim, defective as to form, until it was rejected, and when it was too late to amend.

4. In failing to hold that, if the claim for refund of Niagara and Petitioner be considered together,

Petitioner's claim was not defective in form, or any such defect was waived.

5. In dismissing Petitioner's claim for refund for lack of jurisdiction, and in refusing to order a hearing by the Tax Court on the merits.

SUMMARY OF ARGUMENT

I.

The Commissioner, having examined Petitioner's timely claim for refund on the merits, and having obtained all of the data lacking on the face of the claim, waived any formal defect in the claim, and Petitioner is entitled to a trial by the Tax Court on the merits.

Petitioner and Niagara Falls Milling Company, herein called "Niagara," were New York corporations, engaged in processing wheat, from 1933 to 1936. As such, they were liable for, and paid, processing taxes.

The two corporations had common officers, a common set of books, and a common bank account.

From July, 1933, to January, 1935, the two corporations filed *joint* processing tax returns. From February to December, 1935, Niagara filed such returns for both corporations. The processing taxes due were paid out of their joint account.

In January, 1936, the two corporations filed joint and several claims for the refund of the processing taxes paid, on Form 843.

In June, 1937, Niagara filed a claim for the refund of the processing taxes paid by both corporations, on

Form P. T. 79. In August, 1938, Petitioner filed an "Amendment to Claim" for the refund of the processing taxes paid by it, on Form P. T. 79. Both claims on Form P. T. 79 were timely filed. Niagara's claim was complete; it contained all of the margin data required by the form. Petitioner's claim was not complete, in that it lacked the factual data required by the applicable Treasury regulations and Form P. T. 79.

The Commissioner examined Niagara's claim (P. T. 79) on the merits and agreed to a partial refund of the processing taxes paid. The Commissioner also examined Petitioner's claim (P. T. 79) on the merits, using the same books, records and data as were used in examining Niagara's claim, and he obtained all of the facts and data lacking in Petitioner's claim.

Upon Petitioner's refusal to withdraw its claim, after he had reached a settlement of Niagara's claim, the Commissioner rejected Petitioner's claim, on the grounds (1) that Petitioner was not the taxpayer, a question not involved herein, and (2) that Petitioner's claim was invalid, because the data in support thereof was not submitted with the claim.

All the returns were filed with, all the processing taxes were paid to, all the claims for refund were filed with, and all examinations of the claims were made by, the Collector for the *28th District* of New York. All of these documents, of both corporations, were kept together as one file in the Bureau of Internal Revenue.

Petitioner urges—upon the basis of these established facts—that the Commissioner waived any formal defect in Petitioner's claim for refund.

Insofar as the statute is concerned, the case is no different than any other tax case, (see Statutes, App. D, pp. 50-55 and Regulations, App. E, p. 60). The rule urged by Petitioner is not prohibited by the statute.

Petitioner has complied with Secs. 3772 and 3774 of the Internal Revenue Code, so that the Commissioner has at all times had the power to make the refund claimed, under Sec. 3770 thereof.

The rules applied by this Court, in respect of the power to amend claims for refund, in its many decisions cited herein, are not applicable to the facts of this case. No question of an untimely amendment of a claim for refund is involved.

If all of the evidence in support of a claim for refund is not filed with the claim, under oath, the Commissioner has the matter completely in his hands.

The Commissioner may reject the claim promptly. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *Memphis Cotton Oil Co.* v. *United States*, 59 F. (2d) 276; and he has done so. *Morristown Knitting Mills* v. *United States*, 42 F. Supp. 817.

The Commissioner may give the claimant for refund every opportunity to present factual data lacking on the face of the claim, in his endeavor to settle, rather than litigate, a case, the very purpose of the regulations. He frequently does so. *United States* v. *Memphis Cotton Oil Co., supra; Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; *Samara* v. *United States*, 129 F. (2d) 594, cert. den. 317 U. S. 686; *United States* v. *Elgin National Watch Co.*, 66 F. (2d) 344; *Jaubert Bros.* v. *United States*, 50 F. Supp. 366; *Ney* v. *United States*, 33 F. Supp. 554.

If the claimant relies upon the legal conclusion that it is impossible to prove the claim, it must be rejected. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337; *Landrum* v. *Commissioner*, 122 F. (2d) 857; *Tennessee Cons. Coal Co.* v. *Commissioner*, 117 F. (2d) 452; *Lee Wilson & Co.* v. *Commissioner*, 111 F. (2d) 313, 123 F. (2d) 232; *Morristown Knitting Mills* v. *United States, supra.*

If the claimant refuses to produce such evidence as he has, the Commissioner must reject the claim. *Landrum* v. *Commissioner, supra; Tennessee Cons. Coal Co.* v. *Commissioner, supra; Lee Wilson & Company* v. *Commissioner, supra.*

If the claimant ignores repeated requests to furnish evidence lacking on the face of the claim, he is not to be heard to complain, if his claim is rejected, *Samara* v. *United States, supra; Jaubert Bros.* v. *United States, supra.*

The Commissioner may investigate the claim for refund on the merits, despite the fact that the claim is defective in form. If he does so, and if, at that time, he obtains all of the facts and data lacking on the face of the claim, he should be deemed to have waived any formal defect in the claim.

The Commissioner has the power expressly to waive a formal defect in a claim, *Tucker* v. *Alexander*, 275 U. S. 228, and by implication, *Bonwit Teller & Co.* v. *United States, supra.*

While the question involved herein has never been decided by this Court, *United States* v. *Andrews*, 302 U. S. 517, and *United States* v. *Memphis Cotton Oil Co.*, supra, the lower courts, on the basis of the decisions of this Court in *United States* v. *Memphis*

Cotton Oil Co., supra; Bonwit Teller & Co. v. *United States, supra;* and *Tucker* v. *Alexander, supra,* have practically uniformly held that, if the Commissioner examines a claim on the merits and obtains all of the facts, he is deemed to have waived the requirement that all of the evidence accompany the claim for refund under oath. *Memphis Cotton Oil Co.* v. *United States,* (Ct. of Cls.) 59 F. (2d) 276; *Bethlehem Baking Co.* v. *United States,* (CCA 3rd) 129 F. (2d) 490; *United States* v. *Humble Oil & Refining Co.,* (CCA 5th) 69 F. (2d) 214; *United States* v. *Elgin National Watch Co.,* (CCA 7th) *supra; Reynolds* v. *McMurray* (CCA 10th) 77 F. (2d) 740; and *Howbert* v. *Penrose,* 38 F. (2d) 577. Several district courts have adopted the same rule. See *Bricker Baking Co.* v. *Rothensies,* 46 F. Supp. 742; *Cudahy Packing Co.* v. *United States,* 37 F. Supp. 563, reversed on other grounds 126 F. (2d) 429; *Hutzler Bros. Co.* v. *United States,* 33 F. (2d) 801; *Ney* v. *United States,* 33 F. Supp. 554; *S. & R. Grinding & Machine Co.* v. *United States,* 27 F. Supp. 429; *Shotwell Mfg. Co.* v. *Harrison,* 27 F. Supp. 422; *Conrod Exchange, Inc.* v. *Henricksen,* 27 F. Supp. 427; *University Distributing Co.* v. *United States,* 22 F. Supp. 794; *United States Paper Exports Assn.* v. *Bowers,* 6 F. Supp. 735; *Weihman* v. *United States,* 4 F. Supp. 155 and *Union Trust Co. of Pittsburgh* v. *McCaughn,* 24 F. (2d) 459.

The equities upon which this Court based its decision in *Jefferson Electric Mfg. Co.* v. *United States,* 291 U. S. 386, which is followed in *Anniston Mfg. Co.* v. *United States, supra,* in upholding Title VII

of the Revenue Act of 1936, require the conclusion urged by Petitioner.

II.

If the claims for refund of Petitioner and Niagara be considered together, Petitioner's claim is not defective, or again any defect in form has been waived.

The processing tax returns and all of the claims for refund of Petitioner and Niagara, together with supporting proof, were part of a single file in the Bureau. Niagara's claim for refund of June 30, 1937, was complete; it contained the margin data required, taken from the common books and records of Niagara and Petitioner. If Niagara's claim be considered—not as Petitioner's claim—but as part of the proof lacking in Petitioner's claim, their relationship being clearly known to the Bureau, then again should the Commissioner, after his examination of the claim on the merits, be deemed to have waived any formal defect in Petitioner's claim, upon the basis of the cases cited under Point I, pages 19 to 20, *supra*.

ARGUMENT

I.

The Commissioner, having examined Petitioner's timely claim for refund on the merits, and having obtained all of the data lacking on the face of the claim, waived any formal defect in the claim, and Petitioner is entitled to a trial by the Tax Court on the merits.

A summary of the facts, considered by Petitioner

to be most pertinent, will be helpful to a consideration of the law.

Petitioner and Niagara were two New York corporations, engaged in milling wheat, from 1933 to 1936. (R. 63.) As such, they both were liable for, and together paid, processing taxes, under the Agricultural Adjustment Act, from July, 1933, to December, 1935, in the total sum of $436,231.73. (R. 26-29.)

The two corporations had a common set of officers, a common set of books, a common bank account, and were controlled by a common stockholder, who was their President. (R. 66.)

For the period July, 1933, to January, 1935, the two corporations filed *joint* processing tax returns with the Collector for the 28th District of New York (R. 110, 113-120), and paid their respective processing taxes out of their joint bank account to that Collector. (R. 63-64.)

For the period February, 1935, to December, 1935, Niagara filed returns of processings for both corporations with (R. 110-111, 126), and paid the tax due by both, out of their joint account, to the same Collector. (R. 64.)

After the decision in *Butler* v. *United States*, *supra*, and on January 29, 1936, the two corporations filed joint and several claims for refund of the processing tax paid by them, on form 843, with the same Collector. (R. 11-19.)

At that time, due to the many suits pending, injunctions theretofore unheard of, and other attempts to obtain refunds of the processing tax, or to defeat collection, and the attack upon Section 21 (d) of

the Agricultural Adjustment Act, in *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, and other cases, an amendment to existing law was being considered, and such claims were either being ignored or being rejected automatically.

On June 22, 1936, the Revenue Act of 1936 became law, and processing taxpayers under the Agricultural Adjustment Act were, by Title VII of the Revenue Act of 1936, given until June 30, 1937, App. A, p. 2, (extended to December 31, 1939, by the Revenue Act of 1939, App. D, p. 59) to file their claims for refund. The statute provided, (Sec. 903), that "all evidence relied upon in support of such claim" shall be clearly set forth under oath."

Regulations 96 and Form P. T. 79, issued pursuant to the statute, required that margin data, from which to determine the economic burden of the tax, and other factual data, be set forth in the form (P. T. 79) provided for the claim for refund. (App. A, pp. 8-9, R. 30-39.)

On June 30, 1937, Niagara filed, with the same Collector for the 28th District of New York, a claim for refund of all of the processing tax paid by both Petitioner and Niagara, in the sum of $436,231.73. That claim contained all of the margin and other data required by the regulations. (R. 20-29.)

On August 15, 1938, Petitioner filed a so-called "Amendment to Claim" for the refund of $145,-839.12, being that part of the total tax paid by both corporations, which it considered had been paid by it, with the same Collector. The claim contained no margin data. It did contain an asserted allocation of the refund allegedly due Petitioner and Niagara,

and quite clearly called attention to their interrelationship, already known to the 28th Collection District for New York. (R. 30-39.)

This claim, under then existing law (Revenue Act of 1936), was filed too late (June 30, 1937), but nothing was said about that fact.

Notwithstanding, under date of November 18, 1938, the President of the two corporations received the following letter (R. 125; App. B, p. 15):

Treasury Department
Internal Revenue Service
Buffalo, N. Y.

Office of
Internal Revenue Agent in Charge
200 U. S. Courthouse, Niagara Square
Buffalo Division

November 18, 1938

Mr. Harry Dickinson
Lockport, N. Y.

Sir:

In connection with the investigation of Claim for refund under Title VII, Revenue Act of 1936—Claim F5899, you are requested to allow examination of the following records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc.:

General Ledgers of both corporations for the years 1935 and 1936.
Minute Books of both corporations.

In view of the fact that the investigation will be completed within the next few days, I would

request that these records be made available to me on Monday, November 21, at Room 1011, White Building, Buffalo, N. Y.

Respectfully,

J. BERNARD LIEBEN,

JBL:E *General Deputy Collector.*

The claim of Niagara was examined on the merits, in September, 1938, in July, 1939, and in September, 1940, the Deputy Collector using therefor the joint or common books of account and records of Petitioner and Niagara. (R. 126, App. B, pp. 13-14.)

On June 29, 1939, the Revenue Act of 1939, extending the time for the filing of claims for the refund of processing taxes, became law, and the late claim of Petitioner (filed in 1938) became valid. (App. D, p. 59.)

Accordingly, in September, 1940, at the same time as he was making a final examination of the claim of Niagara, the Deputy Collector for the 28th New York District, Lieben, examined the claim of Petitioner, which then, as to time, was valid. (R. 126-129, App. B, pp. 13-16.)

The only objection at that time made to Petitioner's claim for refund was that, in the Deputy Collector's opinion, Petitioner was not the taxpayer, contrary to the fact, and a fact to be established in a review on the merits.

Niagara, then being in bankruptcy, apparently made a favorable settlement. At least, the Deputy Collector, having made such settlement, sought to have Petitioner withdraw its claim at that time. Petitioner refused to do so. (R. 126-127, App. B, p. 14.)

Then, the Commissioner without requesting further factual data, since he had it all, and without requesting that Petitioner swear to it, since the Collector himself had compiled the necessary data, summarily rejected the claim, on the grounds (1) that Petitioner was not the taxpayer, and (2) that the claim was incomplete and failed to comply with the statute and Treasury regulations. (R. 40.)

On that date, May 23, 1941, the Commissioner had every bit of the data lacking on the face of Petitioner's claim, margin data and all.

In fact, a copy of the working papers of the Deputy Collector, taken from Petitioner's books and records, was obtained by the accountant for Petitioner before Petitioner's claim for refund was rejected. (R. 126-129, App. B, pp. 13-16.)

These are the pertinent facts, simply stated, taken from the Exhibits attached to the Petition, the Amended Petition, and the affidavits and other evidence filed with the Tax Court by Petitioner. Counsel for Respondent was given the opportunity, by the Judge of the Tax Court who heard the Motion to Dismiss, to submit affidavits in contradiction of those filed by Petitioner, and failed to do so, because the facts are as stated by Petitioner.

While there are some facts in the instant case which will not be present in the usual case, the main question involved can apply to thousands of cases. It is—If the Commissioner has before him, for a reasonable period of time, a claim for refund timely filed, but defective in form, in that it fails to contain factual data required by the Treasury regulations, and examines that claim on the merits, obtaining all

of the proof lacking on the face of the claim, after the statutory period of limitations has run is he deemed to have waived the defects in the form of the claim?

The eminently fair and reasonable answer would seem to be "Yes," unless the statute forbids, or some impelling reason of administrative necessity requires, a negative answer.

The statute involved does not so forbid. In essence, it is the same as the statute applicable to *all* refunds—with only one exception of substance, and even in that respect, it is like several other statutes.

True, the statute provides that—"All evidence relied upon in support of such claim shall be clearly set forth under oath"—(Sec. 903, Revenue Act of 1936, App. A, p. 2)—a provision not found in other statutes.

However, that very provision was in the Treasury Regulations from 1916 to 1932 (App. E, p. 60) and can well be said to have been adopted by Congress. Therefore, if the often followed rule, that Congress, in reenacting a statute without change for years, adopts the consistent regulations in interpretation thereof, be given the force of law, it makes no difference whether this provision be in the law or in the regulations. It is the law.

True, also, the claimant for a refund under Title VII, Revenue Act of 1936, must prove that he sustained the economic burden of the tax. (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.)

However, that was the case under Section 424, Revenue Act of 1928, and Section 621, Revenue Act of 1932. (App. D, pp. 51, 54.) It is the case now, un-

der Section 2407 of the Internal Revenue Code, dealing with Retailers' Excise Tax, and under Section 3443 thereof, dealing with Manufacturers' Excise and Import taxes. (App. D, pp. 50-51.)

There is no peculiarity between this case and income or other tax cases, insofar as claims for refund are concerned, because of the statute, even though it deals with the particular subject of processing taxes. In all refund cases, the claim must contain the grounds, and factual data must be given the Commissioner at some time.

The large number of cases dealing with Section 424, Revenue Act of 1928, Section 621, Revenue Act of 1932, *and* with the various income and profits tax statutes, to which reference will be made herein, are mute testimony that, insofar as the Bureau of Internal Revenue has been concerned, there is no difference between this case, under this statute, and the cases under other statutes. If there were, the Bureau could not possibly justify the position it has taken, in these other cases, including income tax cases, that the proof must accompany the claim, practically all of which cases the Bureau has lost, where the facts justified holding that there has been a waiver of any formal defect in the claim for refund.

What then of just, fair, reasonable and usual administrative practice? It does not only *not* require a negative answer—it requires an affirmative answer, to the question submitted by Petitioner.

In the discussion which follows, Petitioner is quite aware of the well-established principle that the Government has the power and the right to determine for itself, by law and by proper regulations which have

the force of law, the conditions upon which it consents to refund tax. (*Nichols* v. *United States*, 7 Wall, 122.)

The question presented here is—when are the conditions of the regulations deemed waived, where a timely claim for refund has been filed? More particularly, Petitioner having filed a timely claim for refund, on the facts present in this case, not the least of which is—there having been an examination of the claim on the merits, at which time the Commissioner obtained all of the proof lacking on the face of the claim—is the Commissioner deemed to have waived the conditions of the Treasury regulation relating to such proof?

An examination of administrative practise and of Court decisions respecting it, always within the framework of the statute, requires an affirmative answer.

A return is made. A tax is paid. The Commissioner audits the return. (If no return is filed, he or his agent, may prepare and file one. (I. R. C. Sec. 3612), (App. D, p. 52). If no return is filed, the tax due may still be paid.)

If the tax, or any part thereof, is erroneously paid, the Commissioner, on his own motion, may refund so much of the tax as was erroneously paid. (I. R. C. Sec. 3770, App. D, pp. 52-53), until the statutory period within which a claim is required to be filed has expired.

Thereafter, the Commissioner may not refund tax erroneously paid, unless a claim for refund has been filed. (I.R.C. Sec. 3774, App. D, pp. 53-54.)

If such a claim has been filed, then the Commis-

sioner has the power thereafter to refund tax erroneously paid. (I. R. C. Secs. 3770 and 3774.)

After a claim has been filed, no suit may be brought, within six months after the filing of the claim, or more than a prescribed number of years after the notice of its rejection has been sent the claimant by registered mail. (I. R. C. Sec. 3772, App. D, p. 53.)

Even though a claim was filed, if no suit has been brought within the prescribed statutory period, the Commissioner may not thereafter refund any tax erroneously paid. (I. R. C. Sec. 3772.) However, if a suit has been brought within the time fixed by statute, then again does the Commissioner regain the power to refund tax erroneously paid. (I. R. C. Secs. 3770 and 3772.)

These powers and limitations on the powers, of the Commissioner, and on the rights of taxpayers, to a refund of tax erroneously paid, are fixed by statute and are jurisdictional.

Neither the Commissioner nor the Courts have the power to extend the statute in any of these respects. *Tucker* v. *Alexander*, 275 U. S. 228.

The claim for refund thus must be timely, i.e., it must be filed within the statutory period prescribed, and suit must be timely filed. Petitioner has complied with these statutory provisions. The Commissioner has, therefore, at all times, had the power to make a refund to Petitioner.

The claim for refund may be amended.

(1) It may be amended, completely to change the grounds, *within* the statutory period of limitations and prior to rejection. *Tucker* v. *Alexander, supra.*

(2) It may not be amended, completely to change the grounds *after* the statutory period of limitations has run and prior to rejection. *Real-Estate Land Title Co.* v. *United States*, 309 U. S. 13; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 69.

(3) It may be amended from a general claim to a specific claim within the terms of the general claim, after the statutory period of limitations and prior to rejection. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factors & Finance Co.*, 288 U. S. 89.

(4) It may not be amended from a specific ground to another specific ground, (especially if previously waived), after the statutory period of limitations has run, and prior to rejection. *United States* v. *Garbutt Oil Co., supra; United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Prentiss & Co.*, 288 U. S. 73.

(5) No claim for refund may be amended *after* the statutory period of limitations has run and *after* rejection.

These rules are those of the statutes and of this Court, on the basis of statutory provisions, guided somewhat by rules of pleading—but not "slavishly." Those cases cited are those much relied upon by Respondent. None of the foregoing rules, however, are applicable to the question herein presented. We are dealing herein—not with a failure to comply with the statute, but with regulations, and with proper administrative practise, in a proceeding in equity.

In the matter of administrative practise, in all decency, the Commissioner should refund all money illegally collected, so long as he has the power to do

so, and he does so constantly. When he is no longer permitted to do so by statute, he may not make a refund.

In thousands of cases, there arises a debatable question respecting the overpayment of tax. The tax is paid, and a timely claim for refund is filed. If the claim is complete, no question arises. If all of the facts in support of the claim for refund are not, at that time, presented under oath, what then?

The Commissioner has the matter completely in his hands. He may reject the claim for refund promptly. *United States* v. *Memphis Cotton Oil Co., supra, Memphis Cotton Oil Co.* v. *United States*, 59 F. (2d) 276. He has done so many times, a fact to be noted from many cases which have gone to Court. For an example, see *Morristown Knitting Mills* v. *United States*, 42 F. Supp. 817.

On the other hand, very frequently, the Commissioner has given the claimant every opportunity to present the factual material lacking on the face of the claim for refund, to facilitate research and so that he may be apprised of the merits of the claim, so that the question involved may be settled administratively and without litigation, if possible—the very purpose of the regulations. *United States* v. *Memphis Cotton Oil Co., supra, Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, *Samara* v. *United States*, 129 F. (2d) 594, cert. den. 317 U. S. 686, *United States* v. *Elgin National Watch Co.*, 66 F. (2d) 344; *Jaubert Bros.* v. *United States*, 50 F. Supp. 366, *Ney* v. *United States*, 33 F. Supp. 554, and innumerable other cases.

This is good administrative practise—and the very

practise which was followed in the subject case, until the very day the claim was rejected.

If the claimant for refund relies on a legal conclusion of impossibility of proof, his claim must be rejected. *Anniston Mfg. Co.* v. *Davis, supra; Landrum* v. *Commissioner*, 122 F. (2d) 857; *Tennessee Cons. Coal Co.* v. *Commissioner*, 117 F. (2d) 452; *Lee Wilson & Co.* v. *Commissioner*, 111 F. (2d) 313, 123 F. (2d) 232, *Morristown Knitting Mills* v. *United States, supra.* (In these cases, there was no examination of the merits of the claim for refund, and the Commissioner had no facts or data before him.)

If the claimant refuses to produce such evidence as he has, again must his claims be rejected, *Landrum* v. *Commissioner, supra; Tennessee Cons. Coal Co.* v. *Commissioner, supra; Lee Wilson & Co.* v. *Commissioner, supra.*

If the claimant ignores repeated requests to furnish evidence lacking on the face of the claim, he has no basis for a suit upon the rejection of the claim. *Samara* v. *United States, supra; Jaubert Bros.* v. *United States, supra.* (In these cases, there was no examination of the merits of the claim for refund, and the Commissioner had no facts or data before him.)

Frequently, also, the Commissioner makes a thorough examination of the claim on the merits, despite the fact that the claim for refund is defective in form. When he does so, and when, as here, the claimant produces all of his books and records, and the Commissioner obtains all of the facts and data lacking on the face of the claim, so that he is not

misled or deceived, but has everything, and perhaps more than, he would have had in the original claim, what then? The Commissioner then, in all fairness, should be deemed to have waived the regulatory requirements that the claim for refund contain such data.

This Court has held that the Commissioner has the power, expressly and by his acts, to waive a defect in the form of a claim.

In *Tucker* v. *Alexander*, *supra*, it was held that the Commissioner, through his agent or counsel, could waive a defect in the form of the claim by stipulation at the trial.

In *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, it was held that the acceptance of a waiver of the statute of limitations relating to the assessment of tax, plus a letter which apprised the Commissioner of all of the facts, in the presence of an admitted overpayment of tax, constituted a waiver of the requirement that a formal claim be filed.

The facts present in the instant case require a similar holding. It is logical to apply the philosophy of those cases to this case, without the necessity of going even as far as this Court went in the latter case.

The only difference in the cases would seem to be that, in those cases, the Commissioner admitted an overpayment of tax, a question going to the merits; whereas, in this case, he denied that Petitioner was the taxpayer, another question going to the merits. However, such questions do not affect the question of a waiver of a defect in the form of the claim by the Commissioner, by reason of his examination of

the claim on the merits. Surely, the question of such a waiver by the Commissioner should not depend on the question of the Commissioner's determination that tax has, or has not, been overpaid—which is a question for the Courts to determine, or at least to review.

While this Court has twice found it unnecessary to its decision to decide the specific question involved herein, when raised, (*United States* v. *Andrews*, supra; *United States* v. *Memphis Cotton Oil Co.*, supra) and has never decided it, the lower courts have frequently passed upon it, and practically uniformly, in favor of the claimant for refund, on the basis of the decisions of this Court in *United States* v. *Memphis Cotton Oil Co.*, supra; *Bonwit Teller & Co.* v. *United States, supra;* and *Tucker* v. *Alexander, supra.*

In *Memphis Cotton Oil* v. *United States*, 59 F. (2d) 276, the Court of Claims had this very question before it and said, at pages 279-280:

> "He had authority under the statute to allow and refund such overpayment as he might determine had been made the basis of any facts before him at the time the claims were filed, or upon facts thereafter obtained by him from an examination of the plaintiff's books and records.
>
> * * *
>
> "The Commissioner therefore, prior to his consideration of the claim and before he had taken any action thereon, was fully informed as to the reasons for the overpayments and the de-

tailed facts to support the same. He was fully advised, and, so far as concerned his jurisdiction and authority to act under the statute with respect to the claimed overpayments, it made no difference whether the facts showing the overpayments were furnished in the first instance by the plaintiff as part of its claims for refund or were already in the possession of the Commissioner, or were obtained by him after the filing of the claims by an examination and audit of the plaintiff's books of account. *Factors & Finance Co., Inc.,* v. *United States, supra.*

"The plaintiff might have amended the claim before the Commissioner had acted thereon so as to state the facts *relied* upon, but the facts obtained by the Commissioner before he had acted rendered amendment unnecessary and fulfilled the requirement of the regulations that all facts relied upon should be set forth by the taxpayer."

This is completely in consonance with the holding in *Tucker* v. *Alexander, supra,* quoted hereinabove; and with this Court's observation in the *Bonwit Teller* case, supra, in which it said, at page 265:

"The Commissioner within the time allowed was advised of the grounds on which the plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim and was fully warranted in holding that the waiver and earlier documents were sufficient." Citing *Tucker* v. *Alexander, supra.*

The Circuit Court for the Third Circuit, in *Bethlehem Baking Co.* v. *United States*, 129 F. (2d) 490; the Circuit Court of Appeals for the Fifth Circuit, in *United States* v. *Humble Oil & Refining Co.*, 69 F. (2d) 214; the Circuit Court of Appeals for the Seventh Circuit, in *United States* v. *Elgin National Watch Co.*, *supra*; and the Circuit Court of Appeals for the Tenth Circuit; in *Reynolds* v. *McMurray*, 77 F. (2d) 740, and in *Howbert* v. *Penrose*, 38 F. (2d) 577, upon varying facts, have held, just as did the Court of Claims, in the *Memphis Cotton Oil case*, *supra*, that an examination of a claim for refund upon the merits, at which time the Commissioner obtains all of the facts lacking on the face of the claim for refund, constitutes a waiver of any such defect in the claim.

Several district courts have adopted the same rule. See *Bricker Baking Co.* v. *Rothensies*, 46 F. Supp. 742; *Cudahy Packing Co.* v. *United States*, 37 F. Supp. 563, reversed on other grounds 126 F. (2d) 429; *Zeller* v. *United States*, 35 F. (2d) 870; *Hutzler Bros. Co.* v. *United States*, 33 F. (2d) 801; *Ney* v. *United States*, 33 F. Supp. 554; *S. & R. Grinding & Machine Co.* v. *United States*, 27 F. Supp. 429; *Shotwell Mfg. Co.* v. *Harrison*, 27 F. Supp. 422; *Con-rod Exchange, Inc.* v. *Henricksen*, 27 F. Supp. 427; *University Distributing Co.* v. *United States*, 22 F. Supp. 794; *United States Paper Exports Assn.* v. *Bowers*, 6 F. Supp. 735; *Weihman* v. *United States*, 4 F. Supp. 155 and *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 F. (2d) 459.

In the Weihman case, the District Court said, pp. 157-158:

"In *United States* v. *Memphis Cotton Oil Company*, 288 U. S. 62, 53 S. Ct. 278, 281, 77 L. Ed. 619 (January 9, 1933), the court said:

" 'The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old.'

"This language is applicable here. In the case at bar the Commissioner holding the claim without action, heard it and heard it on the merits. True, the form was never corrected (that is, it was never formally amended), but the proceedings before the Commissioner was certainly such as to give taxpayer to understand that formal amendment would be unnecessary. . . .

"From an administrative point of view it was the only practical and sensible way to handle the whole situation and, obviously, the Commissioner did not think he was in danger of being misled or prejudiced as to his adversary's case nor did he, until the last minute, indicate the slightest intention of invoking the provisions of the statute and regulations, designed solely to protect him against such an event."

The facts of this case, set forth hereinabove both in detail and in summary, clearly bring this case within the decisions of the Court of Claims, in the *Memphis Cotton Oil case*, of the District Court, in the *Weihman* case, and of the various decisions of the other courts cited at page 37, *supra*. All that is said in those cases applies with equal force to the subject case, and the reasoning in those cases is fundamentally sound.

Had this claimant, between March, 1939, and May 22, 1941, filed a paper, under oath, containing the data which the Deputy Collector already had, its claim would be valid. Is this the sort of empty gesture which the statute and regulations require? Is that what this Court meant, when it said, in *Tucker* v. *Alexander, supra*, at page 231:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. . . If the Commissioner is not deceived or misled by the failure to accurately describe the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

Has the Government been injured, or misled, or deceived, in this case? A timely claim was filed. The Commissioner received all of the information on which any suit would, or could, be based. The statute was complied with, and there was compliance with the regulations, in substance, if not literally. All that was lacking was an oath. Yet, an affidavit would not have proved the facts recited therein, as would and did the books of Petitioner, which Respondent had.

This case is more like a case involving necessary evidence than one dealing with pleadings, as is the situation in a case involving an amendment to a claim. In a suit, if Petitioner had failed in its proof, but Respondent, failing to rest, had supplied the missing proof, Petitioner's case would thereby have been established. The same would apply, in a case in which fraud is charged, where the Government has the burden of proof. If the Government fails to prove one element, and the Defendant supplies it, the case is none the less proved. So here. The Petitioner failed to present all of the required proof at the time of the filing of the claim for refund. Respondent obtained the proof as a result of his own investigations. The claim was otherwise valid. Is the claim to fail, because Petitioner did not swear to the proof, found by the Commissioner in support of the claim? Is that *present* equity?

In *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, this Court had before it the refund of automobile accessory manufacturers' taxes, in connection with the refund of which the taxpayer was required to show that it had borne the burden of the

tax and had not passed it on, directly or indirectly. (Sec. 424, Revenue Act of 1928, App. D, p. 54, the model for Sec. 21 (d) of the Agricultural Adjustment Act, and Title VII, Revenue Act of 1936. Cf. Sec. 903 Revenue Act of 1936, (App. A, p. 2) and Regs. 74, Revenue Act of 1928, and Regs. 77-94, (1932-1936), App. E.) This Court said, at pages 402-403:

> "The present contention is particular faulty in that it overlooks the fact that the statute providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said:
>
> " 'This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo at bono* belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action.' "

It is this very principle that Petitioner requests this Court to apply to the instant case, urging, of course, that, if such a principle is to be applied, it should be applied to support a refund, quite as well as to support the conditions of a refund.

In *Anniston Mfg. Co.* v. *Davis, supra,* this Court, citing the *Jefferson Electric Mfg. Co.* case, held that the provisions of Title VII of the Revenue Act of 1936 afford a claimant for the refund of processing tax collected under the Agricultural Adjustment Act of May 12, 1933, as amended, due process of law. The philosophy back of this statute, and of that decision, requires consideration in connection with the instant case.

The Agricultural Adjustment Act presupposed that the processing tax would be passed on to the consumer. That is why a floor stocks tax was imposed, when the processing tax went into effect, — by Section 16 thereof—so that all goods manufactured of the raw material involved would thereafter move into channels of trade equally taxed. It is also why Section 16 also provided that, when a processing tax terminated, there would be an automatic refund on all floor stocks manufactured of the raw material, the processing of which had been taxed, so that all similar articles would thereafter move into channels of trade equally untaxed. (App. D, pp. 55-56.)

During the period of the Agricultural Adjustment Act, from May 12, 1933, to January 6, 1936, some $980,000,000 were illegally collected as processing taxes.

At the same time, in the last half of 1935, injunctions were obtained, and some $300,000,000 of such taxes were not paid, a part thereof being deposited in escrow in Court, and a part not.

Lest unjust automatic refunds result, under Section 16, Congress sought to plug a loophole by Section 21 (d) of the Agricultural Adjustment Act, by

an amendment passed on August 24, 1935, two days before Congress adjourned. (App. D, pp. 56-58.) In *Rickert Rice Mills* v. *Fontenot*, 296 U. S. 569, and 297 U. S. 110, this Court enjoined collection of the processing tax, due after August, 1935, pending its decision, if placed in escrow, and subsequently ordered the amounts placed in escrow repaid, because the collection of the processing tax had been held illegal in *Butler* v. *United States*, *supra*.

The validity of Section 21 (d) having been seriously questioned in the *Rickert Rice Mills* case and in other cases, Congress, upon reconvening, sought to correct the alleged defects. Congress, in June, 1936, passed Titles IV and VII of the Revenue Act of 1936, as a substitute for Sections *16*, 17 and *21 (d)* of the Agricultural Adjustment Act. Title VII was, in substance, an adaptation of Section 424 of the Revenue Act of 1928, to be applied to different facts. (App. A, pp. 1-7, App. D, pp. 54-55.)

The philosophy of Congress, in Title VII, recognized by the Supreme Court in the *Anniston Mfg. Co.* case, *supra*, was simply this:

Tax has been illegally collected. However, that tax *may* have been passed on to someone else, so that the taxpayer has suffered nothing. As between the taxpayer, who passed on the tax, and the Government, which illegally collected it, such taxpayer has no greater moral right to the money than has the Government and should not get it back. Therefore, a taxpayer may be required to prove that he has borne the burden of the tax, as a condition to its recovery.

The statute and the decision in the *Anniston Mfg.*

Co. case thus have as their entire basis—the application of good morals, of the equitable principle that the taxpayer should not be unjustly enriched. The prevention of unjust enrichment, in an economic sense, underlies both the statute and the decision upholding it.

It is respectfully urged that, if the foregoing respecting the Court's interpretation of the statute be accepted as true, the same broad principle of equity must be applied to the Government, in considering a particular claim under the statute. Following such a view, the instant claim must be considered on the merits. The uncontroverted facts require it.

The Court below most certainly spurned the philosophy of this Court in the *Jefferson Electric Mfg. Co.* case and the *Anniston Mfg. Co.* case, as well as the very sound reasoning of the other lower courts, which have held that, upon an examination of a timely claim for refund, on the merits, the Commissioner is deemed to have waived any formal defect in the claim, when it said (R. 138):

> "It makes no difference to the taxpayer what was his mistake; . . . he awakes to learn that it is never safe to put his trust in officials. . . . The result is often extremely harsh, as this case shows; but he who deals with the Government must dot his i's and cross his t's; and if he assumes that he may rely upon the ordinary rules which apply as between individuals, he is doomed to disappointment."

Are the equities upon which this Court has based its decision and has upheld the validity of Sec. 424,

Revenue Act of 1928, and of Title VII of the Revenus Act of 1936 all one-sided? What becomes then of the principle that we are to determine "whether the defendant (the United States) holds money, which *ex aequo et bono* belongs to the plaintiff" (Petitioner)?

The two foregoing decisions, in *Jefferson Electric Mfg. Co.* v. *United States, supra,* and *Anniston Mfg. Co.* v. *Davis, supra,* are based on the fair and equitable principle that, while the Government has illegally collected tax, the taxpayer, in all justice, should not get it back if he passed it on and thus has not suffered economically, and that a requirement of proof to that end is reasonable, fair and legal. But the Government still holds illegal tax.

Should not the equally fair, equitable rule be then—if there is substantial compliance with the statute—compliance with the grant of Congress to be sued—if the Government, as a result of its investigations of a claim for the refund of the tax on the merits—has all of the facts—is fully apprised of the grounds of that claim and has the evidence in support thereof—any formal defect in the claim for refund is deemed waived?

The Commissioner has the unquestioned power to waive a formal defect in any claim for refund. If he is deemed to have waived such a defect, under the cases cited *supra,* he should most certainly be deemed to have waived any such defect here. If he can do it expressly—as he can—if he can do it by implication—in a case in which he has concluded that tax has been overpaid—under facts otherwise exactly similar to those here present he should be

held to have waived such a defect, even in a case in which he has not necessarily concluded that the tax has been overpaid.

Petitioner urges that the Commissioner waived any defect in the form of Petitioner's claim for refund, and that Petitioner is entitled to a trial on the merits.

II.

If the claims for refund of Petitioner and Niagara be considered together, Petitioner's claim is not defective, or again any defect in form has been waived.

In this respect, the facts in the instant claim clearly depart from the facts in any other known case—but again the principle is of general application.

Petitioner and Niagara filed joint processing tax returns for one and one-half years and Niagara filed such returns for both for eleven months. (R. 110-111, 113-124.)

Then, in 1936, they filed joint and several claims for the refund of the processing tax paid, with the same Collector. (R. 11-19.)

Niagara subsequently, on June 30, 1937, filed a complete claim for the refund of all of the tax paid by both, and Petitioner later, on August 15, 1938, filed an "Amendment to Claim" for the refund of the tax paid by it only, all with the same Collector. (R. 20-39.)

All of these documents were part of one file in the Bureau of Internal Revenue.

The Bureau then examined both claims on the merits, and to do this the Bureau examined their

common books of account—common records and common bank account and checks. (R. 126-129, App. B, pp. 13-16.)

Thus, in the file of Petitioner (and of Niagara), the Commissioner had the same sworn proof he would have had, if Petitioner had incorporated in its claim the figures contained in Niagara's claim, subject to being checked from the books.

Under these peculiar circumstances, can it not be said that all of the proof in support of Petitioner's claim was filed and under oath?

This does not require saying that the claim for refund of Niagara is the claim for refund of Petitioner, as the Circuit Court of Appeals said. Of course, there is no reason why it could not be, if Petitioner clearly and specifically, under oath, had incorporated the claim of Niagara by reference, as part of its own claim, and, therefore, its data also, which data was lacking in Petitioner's claim. However, we need not go that far.

While we do not know what claim was being amended, probably the 1936 claims on Form 843—but not necessarily, (and Dickinson, the then President, is dead), we do know that all returns—all claims—and all books, records and reports were in one file, that both claims were examined on the merits, and that Niagara's claim was considered valid, at least in part. Is this not sufficient to cure a formal defect—where all that is involved are regulations written by the Commissioner for his own protection—so that he will be fully informed? In this case he was unquestionably fully informed.

The Commissioner was not misled. If anything,

the acts and omissions of the Commissioner misled the taxpayer. He received the claim in March, 1938. It was too late and invalid, but in September, 1938, he asked for Petitioner's books, in order to examine Niagara's claim, because he knew of their interrelationship. He was examining a valid claim *then*. By 1939, Petitioner's claim was validated, but it was not examined, until late in 1940, and finally, after its examination on the merits, was rejected in 1941.

From 1933 to 1941, Niagara and Petitioner were treated as one; *erroneously*, but still as one. Under all these facts, in order to determine who *ex aequo et bono* is entitled to the illegal tax, by means of a trial on the merits—should it not be held that the Commissioner waived any defect in the form of the claim for refund?

Petitioner's position on this point is amply supported by the decisions cited at pages 32 to 38, supra.

In true keeping with the principle so often followed by this Court and by the many lower courts, that the Commissioner, to facilitate research and to settle claims administratively, must be advised of the true nature of the claim for refund and of the facts in support of it—and when he has been so fully advised, the conditions of the statute and of the regulations have been met—will not justice and the Congressional will better be served by a holding that, if the Commissioner, through his agents, obtained all of the facts and basic data, which would make a claim formally defective valid, if it had been added to the claim, the Commissioner is deemed to have waived such defect in the claim?

On the facts related under Point II alone, it is

urged that the Commissioner should be held to have waived any formal defect in Petitioner's claim for refund, and that Petitioner is entitled to a review of the Commissioner's rejection of the claim—on the merits.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, and a review of the merits by the Tax Court should be ordered.

Respectfully submitted,

PREW SAVOY,
Attorney for Petitioner.

February, 1945.

APPENDIX D

Statutes Referred to But Not Involved

INTERNAL REVENUE CODE. C. 2, 53 Stat. 1.

SEC. 2407. CREDITS AND REFUNDS. (Retailers' Excise Taxes.)

. . . (b) No overpayment of tax under this chapter shall be credited or refunded, in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the purchaser, or (2) that he has repaid the amount of the tax to the purchaser of the article, or unless he files with the Commissioner written consent of such purchaser to the allowance of the credit or refund.

SEC. 3443. CREDITS AND REFUNDS. (Manufacturers' Excise and Import Taxes.)

. . . (d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written con-

sent of such ultimate purchaser to the allowance of the credit or refund.

Sec. 3443 is an adaptation of Sec. 621 of the *Revenue Act of 1932*, (C. 209, 47 Stat. 169), which follows:

SEC. 621. CREDITS AND REFUNDS.

(a) A credit against tax under this title, or a refund, ~~may~~ be allowed or made—

(1) to a manufacturer or producer, in the amount of any tax under this title which has been paid with respect to the sale of any article (other than a tire or inner tube) purchased by him and used by him as material in the manufacture or production of, or as a component part of, an article with respect to which tax under this title has been paid, or which has been sold free of tax by virtue of section 620, relating to sales of articles for further manufacture.

(2) to any person who has paid tax under this title with respect to an article, when the price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited.

(b) Credit or refund under subsection (a) shall be allowed or made only upon compliance with regulations prescribed by the Commissioner with the approval of the Secretary.

(c) In no case shall interest be allowed with respect to any amount of tax under this title credited or refunded.

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax estab-

lishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

(a) Authority of Collector.—If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, wilfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.

(b) Authority of Commissioner.—In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise—

(1) To make return.—Make a return, or

(2) To amend collector's return.—Amend any return made by a collector or deputy collector.

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

(a) *To Taxpayers*—

(1) *Assessments and collections generally.*—Except as otherwise provided by law in the case of income, war-profits, excess profits, estate, and gift taxes, the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without

authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.

(2) *Assessments and collections after limitation period.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*

(1) Claim.—No suit or processing shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) Time.—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

SEC. 3774. REFUNDS AFTER PERIODS OF LIMITATION.

A refund of any portion of an internal revenue tax (or any interest, penalty, additional amount, or

addition to such tax) shall be considered erroneous—

(a) Expiration of Period for Filing Claim.—If made after the expiration of the period of limitation for filing claim therefor, unless within such period was filed; or

(b) Disallowance of Claim and Expiration of Period for Filing Suit.—In the case of a claim filed within the proper time and disallowed by the Commissioner if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the Board of Tax Appeals or the courts. If such agreement has been entered into, the running of such statute of limitations shall be suspended in accordance with the terms of the agreement.

REVENUE ACT OF 1928, C. 852, 45 Stat. 791

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of

an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchased or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

AGRICULTURAL ADJUSTMENT ACT OF MAY 12, 1933. C. 25, 48 Stat. 31

Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first taxes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded a sum in an amount equivalent to the processing tax with respect to the commodity from which processed.

AGRICULTURAL ADJUSTMENT ACT OF MAY 12, 1933, AS AMENDED AUGUST 24, 1935. C. 641, Sec. 30, 49 Stat. 750, 770

Sec. 21. . . . .

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or

included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person

who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

REVENUE ACT OF 1939. C. 247, Sec. 405, 53 Stat. 862, 884

SEC. 405. FILING OF CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937" and inserting in lieu thereof "January 1, 1940."

APPENDIX E

Pertinent Language of the Regulations Referred to But Not Involved

"All the facts relied on in support of the claim should be clearly set forth under oath."

Regs. 33, Art. 265, Revenue Act of 1916
Regs. 45, Art. 1036, Revenue Act of 1918
Regs. 62, Art. 1036, Revenue Act of 1921
Regs. 65, Art. 1306, Revenue Act of 1924
Regs. 69, Art. 1304, Revenue Act of 1926
Regs. 74, Art. 1254, Revenue Act of 1928

"The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. . . . A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund."

[1]Regs. 77, Art. 1254, Revenue Act of 1932
Regs. 86, Art. 322-3, Revenue Act of 1934
Regs. 94, Art. 322-3, Revenue Act of 1936
Regs. 101, Art. 322-3, Revenue Act of 1938
Regs. 103, Art. 19.322-3, Internal Revenue Code
Regs. 111, Art. 29.322-3, Internal Revenue Code, for tax years commencing after December 31, 1941.

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[1] Regs. 46, Revenue Act of 1932, which covers Sec. 621 (Refund of Manufacturers' Excise Tax), now Sec. 3443 of the Internal Revenue Code, makes no distinction as to claims for refund of various taxes, except as to the facts to be established.

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No. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 610

ANGELUS MILLING COMPANY,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

A.

The Petition for Writ of Certiorari was filed within time.[1]

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on July 24, 1944.

[1] Petitioner is addressing itself to this question, because of the reference thereto in footnote 1, at page 2 of Respondent's Brief, wherein reference is made to **Commissioner v. Estate of Edward T. Bedford**, No. 710 October Term, 1944, and because it is Petitioner's burden to show affirmatively that this Court has jurisdiction. **Gorman v. Washington University**, 316 U. S. 98, 101.

(R. 139.) The case was decided and the opinion of the Court was filed on July 6, 1944. (R. 133.) The petition for a writ of certiorari was filed on October 18, 1944, and was granted on December 4, 1944. (R. 140.)

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, which Act provides, in Par. 8, that *the petition* for a writ of certiorari *must be filed within three months after the entry of such judgment or decree.*

The *judgment* of the Circuit Court of Appeals for the Second Circuit is its "Order of Mandate." If this assertion is true, then the petition herein was timely filed.

The Revenue Act of 1926 was the first revenue act providing for petitions for review, by the Circuit Court of Appeals, of decisions of the Board of Tax Appeals, created in 1924. In connection with the preparation of such petitions, F. W. Dewart, Esq., on behalf of the General Counsel, Bureau of Internal Revenue, addressed inquiries to the clerk of each of the United States Circuit Courts of Appeals, to ascertain exactly when the judgment was entered by each such court. Upon receipt of the replies to such inquiries, the attorneys for the Bureau of Internal Revenue received the following excerpt from the letter of the then Clerk for the Second Circuit:

> "An order for mandate is entered usually one week after a decision is handed down. *This is the only judgment* or decree that is signed, although these orders are subsequently copied into the clerk's minutes. The time for applying

for a certiorari runs from the signing of this order."

After receipt of the "Order for Mandate" herein, counsel for Petitioner inquired of the present clerk of the United States Circuit Court of Appeals for the Second Circuit whether the Order for Mandate is even now the only judgment signed by the Court, and he was orally advised that it is, and that the time within which a petition to this Court may be filed runs from that date.

Upon the granting of the petition in *Commissioner* v. *Estate of Bedford*, No. 710, October Term, 1944, Counsel addressed a letter to the clerk of court, asking whether there had been any change since 1930. To this inquiry, the Clerk replied, as follows:

"February 6, 1945

In reply to yours of the 3rd inst., the order for mandate is the judgment of this Court. The statement made in April, 1930, by the late William Parkin, then clerk of this Court to F. W. Dewart, Esq., then special Attorney to the General Counsel for the Treasury Department, Bureau of Internal Revenue, still stands, with the exception that the time to enter the order for mandate or judgment has been enlarged from seven to fifteen days.

Very truly yours,

Signed: ALEXANDER M. BELL,
Clerk."

If the order for mandate is the judgment of the Court—the only judgment signed by the Court—

then it is the judgment from which the time to petition this Court for a writ of certiorari begins to run.

The Respondent, in its Brief in Opposition in the *Bedford* case, pointed to Rule 30 of the rules of the Circuit Court of Appeals for the Second Circuit and from it drew the conclusion that the opinion of the Court must be its judgment. Otherwise, it was urged, there would be no action of that Court from which to petition, if the mandate were stayed.

The answer is very simple. Section 240(a) of the Judicial Code provides that a petition may be filed either *before* or *after* the entry of judgment by the Circuit Court of Appeals. No action whatsoever is required of the Circuit Court of Appeals as a basis for a petition for a writ of certiorari.

A petition may be filed (1) immediately after the case is docketed in the Circuit Court of Appeals, (2) immediately before argument, (3) after argument but before the opinion is rendered, (4) after the opinion, but before the judgment is entered, or (5) after the judgment is entered—*but* in no event more than three months after the entry of the judgment.

The argument made in the *Bedford* case seems to have ignored the fact that, under Section 240(a) of the Judicial Code, a petition to this Court does not require the entry of a judgment by the Circuit Court of Appeals.

The decision of this Court, in *Department of Banking* v. *Pink*, 317 U. S. 264, is not *contra* to Petitioner's position herein. There, the *judgment was entered* by the Court of Appeals of New York, and it had been the practise to start the running of the

statutory time, *not* from the date of entry of that judgment, but from the subsequent entry of the lower court on the *remittitur*. That practise was held not to comply with the statute.

In the Second Circuit, the time runs from the entry of its judgment, and not from any other date or event. True the judgment is entered two weeks after the opinion is rendered, giving the loser two weeks time within which to petition for rehearing, before the entry of judgment. But, there is nothing in the statute which says, or from which it may be inferred, that any circuit court of appeals must enter judgment the day it renders its opinion.

True, also, in the *Pink* case, this Court said that there was no reason for a different period of review of decisions of the New York Court of Appeals than decisions of other state courts. But—we are not suggesting a different period of review *from the date of entry of judgment*. We are saying only that each circuit court of appeals may determine for itself when it will enter judgment. When it does enter its judgment, then and then only, the three months period begins to run—for an equal length of time as to each circuit court of appeals. Such a view is entirely in keeping with the view of this Court in the *Pink* case.

The decision in *United States* v. *Hark*, 320 U. S. 531 is in point. In that case, the District Court rendered its opinion March 5, 1943, holding that, since the pertinent provisions of the regulation which the appellees were charged to have violated had been revoked prior to the return of the indictment, they could not be held to answer the charge. The last

sentence was: "The Motion to quash is granted."

On March 5 the clerk entered in the docket:—"Sweeney, J. Opinion—Motion to quash is granted." Some days later, the clerk entered on the docket, as of March 5, "Sweeney, J. Indictment quashed."

Upon application of the United States Attorney, Judge Sweeney, on March 31, signed a formal order quashing the indictment, and the clerk struck out the entry of March 5 and entered, as of March 31, "Sweeney, J. Order quashing indictment." On April 30, Judge Sweeney allowed a petition for appeal to this Court.

The Criminal Appeals Act requires that any appeal to this Court be taken "within thirty days after the decision or judgment" has been rendered.

This Court noted that the practise and custom in the District Courts is so diverse that it could not lay down a hard and fast rule as to what constitutes the decision or judgment of the district court. However, as the judge had entered a formal order, knowing he could not extend the time to appeal, this act was given effect and was considered the *judgment* fixing the date from which the time for appeal ran.

Mr. Justice Murphy dissented, and Mr. Justice Douglas and Mr. Justice Rutledge joined in the dissent:

Petitioner's position herein is within the opinions of both the majority and minority in the *Hark* case. The only judgment signed by the Court below is its order for mandate, and it has been the practise, at least since 1930, to consider that the date of the order for mandate fixes the date from which the time for petitioning for a writ of certiorari runs. The

position of Petitioner herein is thus within the opinions of every member of this Court in the *Hark* case.

Petitioner urges that its petition to this Court was timely filed and that this Court has jurisdiction of the case.

In the *Bedford* case, the Government contends that its petition was filed within time, under similar circumstances, and has so noted in footnote 1, page 2, of its Brief herein.

B.

Respondent has misstated the first question of the "Questions Presented."

Respondent says:

> "1. Whether the petitioner's *claim* 'clearly set forth under oath all evidence relied upon in support' of the claim as required by Section 903 of the Revenue Act of 1936, as amended. . . ." (Respondent's Brief, p. 2.)

The statute contains no such requirements. The statute says nothing about the *claim* being accompanied by any evidence. The Act merely requires that all the evidence, whenever submitted in support of the claim, shall be under oath.

While Article 201 of the Regulations (App. A, 8) requires that the claim, Form P. T. 79, be completed, Article 202 definitely suggests that the evidence required by the Form may be submitted at a later date.

Art. 202 of Regulations 96 (App. A, 8-9), which is the Bureau's current interpretation of the mean-

ing of the sentence—"All evidence relied upon in support of such claim shall be clearly set forth under oath"—provides:

> "Art. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each *ground* upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and *to substantiate* by clear and convincing *evidence all of the facts* necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.
>
> "The provisions of these regulations require that certain specific *facts* shall be stated in support of any claim for refund. The claimant is privileged to *prove those facts in any manner* available to him and to submit such evidence to that end as he may desire." (*Italics* supplied.)

The substance of Article 202 is very similar to the substance of the Regulations respecting claims for refund generally, from 1932 to date, quoted in Appendix E, (Petitioner's Br. p. 60), with an additional reference to the requirement that adequate proof must be submitted in support of the *grounds* (or facts) set forth in the claim for refund of processing tax. However, such a requirement is inherent in connection with all claims for refund.

The practise in the Bureau of Internal Revenue was in keeping with Article 202, and not Article 201, of the Regulations, and was contrary to the position taken by Respondent in the "questions presented." A mere cursory examination of such cases as *18th St. Leader Stores* v. *United States*, 142 F. (2d) 113,

cert. den. Oct. 9, 1944, *Jaubert Bros.* v. *United States*, 50 F. Supp. 366, 141 F. (2d) 206, *Samara* v. *United States*, 129 F. (2d) 594, cert. den. 317 U. S. 686, and many others, will show that *usually* the Commissioner wrote several letters to a claimant for refund, (even as many as five), giving him every opportunity to present evidence lacking on the face of the claim, right up to the time of rejection. If the *statute* required that the evidence accompany the claim, the Commissioner would have been powerless to pursue such a practise—but the statute does not contain such a provision.

The misstated question goes to the very core of Respondent's position—for it is only by assuming such a requirement that Respondent is able to argue that failure to present all of the evidence with the claim is jurisdictional and cannot be waived by the Commissioner. Thus, the question as stated begs the very question involved herein.

Petitioner does not argue, in the face of the many decisions cited in both briefs, that, if the statute contains requirements with which Petitioner has not complied, the Commissioner can waive them.

Petitioner urges that it complied with the requirements of the statute by filing a claim which apprised the Commissioner of the grounds relied upon.

Petitioner also urges that it complied with Article 202 of Regulations 96, except that it did not eventually *submit* all of the evidence supporting its claim, for the reason that the *Commissioner* eventually, through his agent, *obtained* all of the evidence lacking on the face of the claim.

Petitioner failed only to comply with the require-

ments of Form PT 79. But, again, the Commissioner obtained all of the data lacking on the face of that form, prior to his rejecting the claim.

The sole question, then, is, as stated by Petitioner:

> "Whether the Petitioner may maintain its suit for the refund of processing taxes, where the claim for refund contained the nature of the claim, but not the data in support thereof, and where the Commissioner, through an examination of the claim on the merits, by a deputy collector, learned all of the facts and obtained all of the basic data, which, if presented in the claim, would have been an adequate basis for allowing a refund."

C.

Petitioner's Reply to Respondent's Argument.

The replies to Respondent's Argument below are equally applicable to Respondent's Summary of Argument. The points in Respondent's Brief are considered *seriatim*.

1. (Resp. Brief, pp. 12-19.) *Petitioner recognizes that Title VII of the Revenue Act of 1936 provides the exclusive remedy for recovery of amounts paid as tax under the Agricultural Adjustment Act.*

Petitioner also recognizes that the problem involved was complex and that Congress and the Bureau made elaborate plans to deal with it.[2]

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[2] The statute involved has been completely analyzed by this Court. **Anniston Mfg. Co.** v. **Davis**, 301 U. S. 337; **Webre Steib Co., Ltd.** v. **Commissioner**, No. 148, decided February 12, 1945.

To what extent the Commissioner was justified, "in requiring that the necessary information be supplied in a uniform manner and with sufficient completeness to permit it to be promptly handled and verified," (Resp. Br., pp. 18-19), or in waiving such requirements, is not involved herein.

The fact is, that the uniform practise was *not* to require that the evidence accompany the claim, as is to be inferred from Respondent's question k, but to examine the claim, and *then* to give the claimant an opportunity to furnish the evidence lacking on the face of the claim, *prior* to any examination of the claim on the merits. This procedure was followed in the many cases cited in Petitioner's Brief, at page 33, and generally. It was not the practise followed in this case.

The reasons why the uniform practice was not followed in this case are (1) because Petitioner's claim was so inextricably tied up with the claim of Niagara Falls Milling Company that both claims had to be examined on the merits, to make any determination as to either claim, and (2) because, upon examining Petitioner's claim on the merits, the Commissioner obtained all of the data lacking on the face of Petitioner's claim.

It is the failure to follow the uniform practice, which Petitioner asserts as error (a) (R. 66), namely—"in failing to give the consideration to, and the *usual* hearings on, Petitioner's claim."

While attention was called to this departure from the uniform practice, the matter is not pressed, because Petitioner's position is that the Commissioner waived any defect in the form of the claim, upon

his examination of the claim on the merits, and upon his then obtaining all of the data lacking on the face of the claim, which established that Petitioner bore the burden of the tax paid by it.

2. (Resp. Brief, pp. 19-29.) *Petitioner has not failed to comply with the conditions precedent to the maintenance of this action, as urged by Respondent.*

There was not a "failure to comply with the valid requirements of the statute *and* Regulations." There was no failure whatsoever to satisfy the requirements of the statute, and any failure to comply with the requirements of the Regulations was waived by the Commissioner.

Petitioner has not urged that the Government may be sued without its consent, nor has it argued against the necessity of complying with the conditions of the *statute* as a condition precedent to suit, and that compliance therewith is jurisdictional. (Resp. Brief, pp. 19-20.)

These principles, however, refer to compliance with statutory provisions, *not* with Regulations. After stating these principles, Respondent has calmly added to the word "statute"—*and Regulations*, seeking thereby to make strict compliance with the Regulations jurisdictional. There is no basis in the decisions for such a position; in fact, the contrary is true.

Petitioner reiterates—in order to make it very clear—that the Commissioner, prior to the rejection of the claim, had all of the data, including the margin data, called for by the statute, and that the stat-

ute, (as well as the uniform Bureau practice), did not require such data to accompany the Form P. T. 79. It is Petitioner's position that the Regulations, to the extent that they required that certain evidence accompany the claim, could be, and were, waived.

The claim (R. 30-39) contained the name and address of claimant, the amount claimed, a schedule showing the allocation of refund due Niagara *and* Middleport Flour Mills, Inc. (Angelus—the Petitioner) and a statement clearly showing the interrelationship of the two companies, and the total amount of tax paid by the two companies. (R. 30-32.)

True, the allocation contained in the claim for refund (R. 32) does not correspond with the amounts in the petition (R. 51-52) or the amended petition (R. 64-65). The reason is understandable. The claim for refund was filed without the benefit of the books, prior to, whereas the petitions (which do agree as to amounts) were filed after, the Commissioner's examination of the claim for refund on the merits, and after Petitioner had obtained the corrected data from the Deputy Collector. (R. 126-129, App. B, pp. 13-16.)

The claims previously filed on Form 843, (R. 11-19) indicate that the tax was "paid" by Niagara. However, the tax returns filed by the persons liable for the tax were filed by Niagara and/or Middleport—or for both, and the tax was paid out of the funds of each, out of their joint account. The fact that the common officer of both signed the check in the name of Niagara (or Middleport) is therefore of

no significance. The question is—whose tax was paid, and out of whose money was the tax paid? This question will be discussed at length under 4 below.

If the matter were to stop here, and there were nothing further, Petitioner would not be before this Court, in view of the cases cited, at pages 23 and 24 of Respondent's Brief. In fact, Petitioner has given these cases due recognition, at pages 32 to 33 of its Brief.

In these cases, however, the claimant failed or refused to give the Commissioner the evidence which he repeatedly requested; there was no examination of the claim on the merits, so that the Commissioner could, and did, obtain the evidence, and thus there was no waiver of the Regulations. In the instant case, the Commissioner obtained all of the required evidence, when he examined the claims of Niagara *and* Petitioner on the merits. It is this fact that makes this case so fundamentally different from the cases relied upon by Respondent.

Respondent has not denied that all of the data missing on the face of Petitioner's claim was contained in Niagara's claim (R. 20-29), or that both claims were kept together in the Bureau in the custody of the same person, and that these data came from the common books of account of Petitioner and Niagara, which were examined by the Deputy Collector, because such are the facts.

To the argument that all of the claims, considered together, contain the basis data, Respondent has answered—(p. 25):

> "The entire argument is in generalities and much of it is not supported by record. Especially is there no support for the repeated and emphatic assertions that the Commissioner had all of the data necessary to pass upon the petitioner's claim on its merits."

What these generalities are, Respondent does not indicate. Furthermore, the example given is not justified, in the presence of the facts known to Respondent, or which should be known to Respondent, and is unworthy of the Government.

In connection with the hearing on the motion to dismiss for lack of jurisdiction, in lieu of bringing witnesses from Niagara Falls to Washington, at the expense of this small company, counsel obtained affidavits of the accountant present when the Bureau examined Petitioner's claim, and of its President, as he is permitted to do.

As Respondent knows, under Rule IX of the Treasury, its employees are forbidden to testify. A claimant, therefore, must proceed without the benefit of admissions of the truth of its assertions by the Government, in answer to a subpoena.

Jackson swore that he spent several days with several representatives of the Bureau and that they fully examined Petitioner's claim on the merits. (R. 129, App. B, p. 16.)

O'Connor stated under oath that, when the Bureau examined the claim of Niagara, an examination was made of Petitioner's records and that he knows of his own knowledge that Petitioner's claim was examined on the merits. In fact, in 1939, Petitioner received copies of the Government's work papers,

compiled in the examination of Niagara's claim. (R. 126-128, App. B, pp. 13-16.)

When these affidavits were received by the Tax Court, Respondent was given the opportunity to submit affidavits in opposition, but has never done so, because the facts therein stated are true.

On the basis of these affidavits—of the claim of Niagara (R. 20-29) which contains the basic data, including margins, of the offer of the Government to settle with Niagara (R. 126-127, App. B, 14), and of the fact that the processing tax returns and claims for refund of Petitioner and of Niagara, and all of their files have been kept together, Petitioner concludes and asserts that Respondent, on the day Petitioner's claim was rejected, had all of the basic data lacking on the face of the claim.

If these asserted facts are not true, Respondent should certainly have the persons named in the affidavits as the persons who examined the Petitioner's claim on the merits deny them, under oath. If they are true, as they are, it is certainly unfair to this claimant for the Government to make statements respecting these facts—from which an inference to the contrary may be drawn.

Respondent then goes on to say, at page 27 of its Brief, that it knows of no authority which would permit this Petitioner to bring a suit on the claim filed by Niagara and cites innumerable cases to the effect that a claim for refund of the processing tax must be filed by the person who was liable for, and who paid, the tax.

Petitioner has never claimed, and does not now claim, that it may bring suit, or has brought suit, on

the claim filed by Niagara. Petitioner does urge that the data contained in Niagara's claim may be incorporated in its claim by reference—and become evidence in support of Petitioner's claim—by calling its claim "Amendment to Claim"—that the data in Niagara's claim was in a file kept with Petitioner's file in the Bureau—and that the Commissioner had all of the data lacking on the face of Petitioner's claim.

The cases cited at page 27 involved persons who were not first processors and therefore were not liable for the processing tax, or of processors who were first processors and who paid the tax but were reimbursed. While they may or may not have stood the impact of the processing tax, at some time, and even ultimately, Congress did not provide for their relief under Title VII of the Revenue Act of 1936.

Petitioner, on the other hand, was a processor of wheat—and the tax due by it was paid out of its monies—so that it was a person liable for, and who paid, the tax.

The cases cited, therefore, have no application.

From the statement accompanying Exhibit C (R. 33) Respondent concludes, at page 28, that Petitioner disavowed any purpose that Exhibit C be treated as an amendment of Niagara's claim.

The conclusion is not correct. All that Petitioner says in the statement is that—Niagara being bankrupt and having claimed the refund of Petitioner's tax as well as its own, Petitioner does not want its tax refunded to Niagara, but wants the tax it paid refunded to it.

Finally, at page 29, Respondent says that "the

record indicates (R. 126-127, App. B, pp. 13-14) that the Commissioner did not require separate evidence from petitioner until petitioner insisted on separate treatment. Cf. Petitioner's Brief, pp. 25, 48."

This statement is not correct. Petitioner's request for a separate refund was made August 15, 1938. (Ex. C. R. 30-39.) The foregoing admission by Respondent as to proof in the record that *all* of the evidence of Petitioner *and* Niagara was considered by the Commissioner in connection with the examination of Petitioner's claim on the merits covers the years 1938, 1939, 1940 and until May, 1941, when Petitioner's claim was rejected.

Despite this admission, Respondent still suggests that the record does not support Petitioner's assertion that, when he rejected Petitioner's claim for refund, after his examination of Petitioner's claim on the merits, the Commissioner had all of the evidence lacking on the face of the claim.

The Court below was not unwarranted, as asserted by Respondent, in criticizing the Commissioner upon the assumption that he had given the petitioner reason to believe that he would consider its separate claim upon the merits. (R. 136-139.)

The Commissioner's examination of the claims of Niagara and of Petitioner, and of their common records, from 1938 to 1941, did lead Petitioner so to believe, *until the very day* on which Petitioner received the Commissioner's letter of rejection. In fact, until the letter of rejection of May 23, 1941 (R. 40), the Commissioner had contended only that Petitioner was not the taxpayer, a question to be determined on the merits—Point IV, *infra*.

That this was the important question in the Commissioner's files relating to Petitioner's claim for refund is indeed apparent from the fact that, after Petitioner filed its petition with the Processing Tax Board of Review, on August 20, 1941 (R. 7), the Respondent filed a "Motion for Better Statement of Claim" on October 4, 1941 (R. 42), and a "Renewal of Motion for Better Statement of Nature of Claim" on November 26, 1941 (R. 54), raising only the question as to whether Petitioner was the processor and taxpayer. It was not until February 16, 1942, that Respondent moved to dismiss for lack of jurisdiction.

If, on May 22, 1941, only one day before the letter of rejection, Petitioner had filed the data which the Commissioner already had in his files, the defect which is the subject of this proceeding would have been cured.

Surely, this Court will not require such an empty gesture as the basis of a right to a hearing on the merits.

3. (Resp. Brief, pp. 29-38.) *The defects in Petitioner's claim were waived by the Commissioner.*

In its examination of this question—which is in reality the only question involved herein—Respondent has omitted some rather important established facts, or facts deemed admitted upon a motion to dismiss.

From July, 1933, to January, 1936, Petitioner and Niagara were processors of wheat and as such were

required to file processing tax returns and to pay the processing tax. (R. 63) (omitted).

The two corporations, during all of this period, had common officers, a common set of books and a common bank account. (R. 66) (Partly omitted).

From July, 1933, to January, 1935, the two corporations filed *joint* processing tax returns with the Collector for the 28th Collection District of New York. From February, 1935, to December, 1935, Niagara filed returns for both corporations with the same Collector. (R. 63-64) (omitted).

From July, 1933, to December, 1935, the two corporations paid a total processing tax to that Collector of $436,231.73 (R. 20-29). (Omitted.)

In June, 1936, the two corporations filed three joint and several claims for the refund of processing tax, on Form 843, in the total sum of $434,045.27, (R. 11-19), with the same Collector. (Omitted.)

In June, 1937, Niagara filed a claim for the refund of the processing taxes paid by both corporations, on form P. T. 79, which claim was accompanied by all of the data, including margins, called for by the Regulations, with the same Collector. (Omitted.)

In August, 1938, Petitioner filed an "Amendment to Claim" for the refund of processing tax paid by it in the sum of $145,839.12, asking that it receive a refund separate and distinct from any made to Niagara (R. 30-39), with the same Collector. (Omitted in this point.)

All of the foregoing documents were kept together in the office of the Collector for the 28th District and in the Bureau of Internal Revenue, Washington.

In November, 1938, the Deputy Collector examined the claim of Niagara on the merits, and at that time examined all of the books and records of Petitioner. (R. 126-129, App. B, 13-16.)

In 1939, Petitioner received a copy of the Deputy Collector's work sheets—taken from the common books and records of Petitioner and Niagara. (R. 126, App. B, 13.) (Omitted.)

In September, 1940, the Deputy Collector made a further and separate examination of Petitioner's claim for refund on the merits. (R. 126-129, App. B, 13-16.) (Questioned.)

Prior to May 24, 1941, Respondent settled the claim for refund of Niagara. (R. 126-127, App. B, 14). (Omitted.) When Petitioner refused to withdraw its claim, Respondent, then, under date of May 24, 1941, rejected the claim, and for the first time, in the letter of rejection, questioned the sufficiency of Petitioner's claim for refund.

None of these facts can be denied, for they are true. Respondent has referred only to the facts set forth in the affidavits (R. 126-129) relating to the examination of Petitioner's claim on the merits and has left out the other facts, which facts are very pertinent to a determination as to whether the Commissioner, as a matter of law, may be held to have waived the Regulations.

The uncontradicted testimony of O'Connor and Lyons that the Deputy Collector did make a complete examination of Petitioner's claim for refund on the merits is belittled by the suggestion that the required data could not be obtained from the books, or at least from just an examination of the books (Resp. Brief, pp. 33-34). Support therefor is found

in the statement in Niagara's claim (Ex. B, R. 27) to the effect that it had not been able to complete the compilation of its supporting data, as of June 30, 1937, the last day for the filing of claims for refund under Section 903 of the Revenue Act of 1936.

The fact is that the common books and records of Petitioner and Niagara were the only source from which such data could be obtained—that, in 1938, the Deputy Collector obtained the required data from these records, and in 1939, Petitioner obtained a copy of the Collector's work sheets taken from these books and records. (R. 125-129, App. B, 13-16.)

The Tax Court held (1) that the claims did not set forth sufficient evidentiary basis for determining the probable merits of the claim, and therefore, *upon the authority of the cases cited*, the claims were insufficient to give the Court jurisdiction in the proceedings, and (2) that it was unable to hold that the defects in the claim had been (expressly) waived by the Commissioner, so that the proceedings must be dismissed for lack of jurisdiction. The Circuit Court of Appeals reluctantly upheld the Tax Court, on its concept of this Court's decision in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62.

Petitioner has presented no argument with respect to its first conclusion of law of the Tax Court. Petitioner's case is predicated upon the error in the Tax Court's second conclusion of law, resulting from its restricted interpretation of the law respecting waivers.

The second conclusion of law of the Tax Court is based upon holding in effect that the Commissioner

did not expressly waive the defects in the claim. While the Tax Court does not use the word "express," it is obvious, from the following analysis, that that word must be considered part of its subsidiary findings.

A. After examining the affidavits of Lyons and O'Connor, and the letter from the Deputy Collector to Petitioner's President, the Tax Court says: "It has not shown, however, that the Commissioner waived any defects in its claim" (R. 96). That must necessarily mean an expressed waiver.

B. After examining the various allegations contained in the affidavits, the Tax Court concludes: "The affidavits are not convincing that the Commissioner waived any defects in the claim of this Petitioner" (R. 96). Again that refers to an expressed waiver.

C. Again the Tax Court says (R. 97): "The letter of the Commissioner rejecting the claim of the Petitioner indicates on its face that the Commissioner did not waive any defects in the claim." Very obviously this means that, considering the contents of the letter, the Commissioner could not have *expressly* waived the defects in the claim.

The Tax Court's ultimate conclusion of law that there was no waiver of the defects in Petitioner's claim by the Commissioner is contrary to the decisions cited at pages 35 to 41 of its Brief. Such a decision is not final, but is subject to review, if there is to be any review by the appellate courts.

The facts alleged in the Amended Petition must be taken as true for the purpose of a motion to dismiss for lack of jurisdiction. *Ickes* v. *Development*

Corp., 295 U. S. 639, 646; *United States* v. *Revere Copper & Brass, Inc.*, (CCA 2nd), 100 F. (2d) 392. The facts set forth in the affidavits should be accepted as true, in the absence of any proof to the contrary, and Respondent offered no such proof, though permitted to do so by the Judge of the Tax Court. Any facts found by the Tax Court contrary to the only evidence before the Court is an error in law. *Dobson* v. *Commissioner*, 320 U. S. 489, 501; *Planters Operating Co.* v. *Commissioner*, 55 F. (2d) 583, 585, and cases cited therein.

Respondent urges that the statements in the affidavits of O'Connor and Lyons, that there was an examination of the claim on the merits, are inconsistent with error (a) of the pleadings. The Tax Court also misunderstood the purpose of this allegation of error. As pointed out above, Petitioner, in that statement, was complaining only that it had never been requested to furnish any additional evidence in accordance with the usual practice of the Bureau—that it was not accorded the treatment uniformly accorded others.

The Tax Court also concluded that Petitioner had failed to allege that the Commissioner had waived defects in the claim and had investigated the claim on the merits. (R. 97.) While these assertions are not set forth in so many words, they are inherent in, and amply covered by, the assertion that—

> "(C) The Commissioner erred in holding that Petitioner failed *to establish* that it bore the burden of the tax, refund of which is claimed."

The evidence did not accompany the claim. Yet the Commissioner erred in failing to hold that Petitioner had *established* that it bore the burden of the tax. How?

In support of this allegation of error, when the Motions to Dismiss for Lack of Jurisdiction were argued, Petitioner filed the joint tax returns and two affidavits, and made clear that the evidence not submitted by Petitioner was obtained in connection with the Commissioner's examination of the claims of Petitioner and Niagara on the merits. A waiver of the Regulations necessarily had to follow. Otherwise, the error alleged is meaningless.

Respondent then urges, P. 35, "Moreover, no waiver case goes to the extent of holding that a mere discovery of the facts by the Commissioner will constitute a waiver."

Petitioner has not urged this. Petitioner does urge that, if the Commissioner, in connection with his examination of a claim on the merits, obtains all of the evidence lacking on the face of the claim, which he requires by regulation to be submitted, and says nothing about the insufficiency of the claim until the time to amend has expired, he is deemed to have waived the requirement of the regulation. This position is unqualifiedly supported by the decision of the Court of Claims in *Memphis Cotton Oil Co.* v. *United States*, 59 F. (2d) 276, (affirmed on other grounds 288 U. S. 62), and all of the cases cited at page 37 of Petitioner's Brief.

In *Bethlehem Baking Co.* v. *United States*, 129 F. (2d) 490; *Bricker Baking Co.* v. *Rothensies*, 46 F. Supp. 742; *Reynolds* v. *McMurray*, 77 F. (2d) 740;

and *Howbert* v. *Penrose*, 38 F. (2d) 577, and other cases, the Commissioner had not taken definite affirmative action indicating that he had been able to determine an overpayment, as asserted by Respondent, at p. 35, and the facts were held nevertheless to support a waiver in law.

Even if an affirmative finding by the Commissioner were present in each case wherein the Commissioner was held to have waived the defect, it is to be noted that in no case was that fact, in and of itself, considered to be of any importance, or a determining factor, in the cases cited by Petitioner.

Furthermore, should the presence or absence of a finding of overpayment by the Commissioner be determinative of the question involved? If the Commissioner, on the facts present in this case, be deemed to have waived a defect in the claim, should Petitioner be denied a trial on the merits, because the Commissioner will not concede that Petitioner is entitled, on the merits, to a refund? To state the question is to answer it.

It is not necessary that the Commissioner, after his examination of the merits of a claim, make a determination of the merits and notify the claimant thereof, in order that he be held to have waived a defect in the claim, and no Court has placed any such limitation on its decision.

Respondent then argues that the words—"All evidence relied upon in support of such claim shall be clearly set forth under oath"—are not the same as the excerpt from Treasury Regulations from 1916 to 1932, (App. E, Pet. Brief 60) and cites cases (p. 36) alleging that they support a distinction between

the one difference—"all the facts"—as distinguished from "all the evidence."

That this expression in the statute was lifted from the Regulations and the words adapted to fit the needs of the statute cannot be denied. In no other tax statute do these words appear, and they appear only in the Regulations mentioned.

After 1932, the language of the Regulations was changed. (App. E, Pet. Brief 62.)

The Commissioner's own interpretation of the meaning of these words in the Revenue Act of 1936 is substantially the same as his interpretation of the requirements of all claims for refund, whether for income taxes, or excises requiring proof of the burden of the tax. (Cf. Article 202, Regs. 96, App. A, 8 and App. E, Pet. Br. 60.)

In all of the cases cited by Respondent, at page 36, the Petitioner failed or refused to furnish any evidence in support of the claim for refund, (in *18th St. Leader Stores* v. *United States*, 142 F. (2d) 113, cert. den. October 9, 1944, even after five requests); and there was no consideration of the claim on the merits.

In the instant case, Petitioner's books and records were before the Commissioner and he obtained all of the evidence lacking on the face of the claim and considered the claim on the merits.

The difference in the facts readily show why the cases cited have no application and account for the subject case being before this Court.

In those cases, the facts to support a waiver of defects in the form of the claim are lacking; in the subject case they are present.

Finally, the statement of Respondent, at pages 36-37 of its Brief, and the statements and cases which follow show the confusion resulting from misstating question 1.

In referring to *Tucker* v. *Alexander*, 275 U. S. 228, Respondent says:

> "That case was fully explained in *United States* v. *Garbutt Oil Co., supra*, p. 523, and holds simply that a Government official (counsel for the Government in that case) may waive the proper 'form and contents' of a claim for refund, prior to the expiration of the period of limitations, when the only effect of an insistence upon a proper statement would have been 'the resort of filing a new claim and pursuing it through the Bureau and the courts.' (302 U. S. 534.) Here, on the other hand, the Commissioner's alleged waiver would have been an attempted abandonment of an absolute defense to petitioner's claim."

Of course, this conclusion is present in every case in which it has been held that the Commissioner waived requirements of his regulations.

There follow the conclusions (1) that compliance with the statute *and the Regulations* is required as a condition precedent to suit against the Government, and (2) that conditions precedent to suit, prescribed by statute, cannot be waived by the Commissioner.

Clearly, the two conclusions are not dealing with the same subject—nor with the question involved herein.

After combining the statute *and the Regulations*,

Respondent applies the rule which has reference to compliance with statutory provisions only.

Petitioner has not urged that it need not comply with statutory conditions precedent to a suit against the Government, nor that the Commissioner may waive such conditions.

Petitioner does urge that the Commissioner may waive, and can be held to have waived, conditions to suit prescribed by his Regulations, and that he did waive the defects in the claim for refund of Petitioner.

4. (Resp. Brief, pp. 38-39.) *Petitioner is the Taxpayer.*

Respondent continues to urge that Petitioner is not the taxpayer and that for this additional reason the Tax Court was without jurisdiction.

Petitioner recognizes that the Tax Court is without jurisdiction to entretain a suit based upon a claim for refund filed by a person who was not liable for, and who did not pay, the tax.

However, Petitioner was liable for the processing tax on wheat and paid the tax which is the subject of this case. If there is any question in respect thereof, it must be tried on the merits.

Paragraph 2 of the Amended Petition (R. 63) alleges that *Petitioner was a processor of wheat,* during the period July 9, 1933, to January 6, 1936. This allegation is denied in paragraph 2 of the Answer (R. 82), so that the allegation is at issue.

Under Section 9 of the Agricultural Adjustment Act of May 12, 1933, as amended, when the processing tax on wheat became effective, on July 9, 1933, a

processor of wheat became liable for the processing tax on wheat. *As such processor, Petitioner was liable for such tax.*

Paragraph 4 of the Amended Petition alleges that, for the period July 9, 1933, to January 31, 1935, *joint returns on account of the processing of wheat by Petitioner* and Niagara Falls Milling Company *were filed* with the Collector of Internal Revenue for the 28th District of New York, and tax in the sum of $324,016.25, was paid on account of such processing. While this allegation is supported by the actual returns (R. 113) and the statement of evidence (R. 110), the allegation is denied in paragraph 4 of the Answer, so that it is at issue.

Paragraph 5 of the Amended Petition alleges that, for the period February 1, 1935, to November 30, 1935, *returns were filed* in the name of Niagara Falls Milling Company, *on account of the processing of wheat by Petitioner* and Niagara, with the same Collector, and tax in the sum of $110,929.02, was paid on account of such processing. This allegation is denied in paragraph 5 of the Answer and is at issue.

Paragraph 6 of the Amended Petition alleges that, of the aforesaid sums, mentioned in paragraphs 4 and 5, processing tax on wheat in the total sum of *$186,751.99, on account of the processing of 709,906 bushels of wheat by Petitioner, was paid out of monies belonging to Petitioner. This fact, if proved, makes Petitioner the taxpayer.* This allegation is denied in paragraph 6 of the Answer and is at issue.

Petitioner did not allege that it was the taxpayer, a mere conclusion, but alleged the facts showing it was liable for, and paid, the processing tax.

In a trial on the merits, Petitioner will prove that Petitioner and Niagara had a common set of officers, kept a common set of books, and had a common bank account, out of which the wheat purchased by each was paid, and out of which the processing tax due by each was paid.

As Petitioner was a processor of wheat and as such liable for the processing tax, as Petitioner filed returns showing liability for such tax, and as such tax was paid out of its bank account, Petitioner is at a loss to understand how Respondent can still assert that it was not the taxpayer, and that, on that account, the Tax Court was without jurisdiction to hear its appeal on the merits.

The allegations of the Amended Petition are clear and unmistakable, and are at issue. In a trial upon the merits, Petitioner will prove beyond any doubt that it was the taxpayer, and as such, had a right to file a claim, and is entitled to a refund upon proof that it bore, in fact, the burden of the tax.

Regardless, for the purposes of the motion to dismiss, the allegations mentioned are deemed to be true. *Ickes* v. *Development Corp.*, supra; *United States* v. *Revere Copper and Brass, Inc.*, supra.

CONCLUSION

The decisions below are in error and should be reversed, and a review of the merits of the claim for refund by the Tax Court should be ordered.

Respectfully submitted,

PREW SAVOY,
Attorney for Petitioner.

March, 1945.

FILE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 610

ANGELUS MILLING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of The Tax Court of the United States (R. 91–97) is reported in 1 T. C. 1031. The opinion of the Circuit Court of Appeals (R. 133–139) is reported in 144 F. 2d 469.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming that of the Tax Court, was entered on July 24, 1944 (R. 139). The petition for a writ of certiorari was filed on October 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in dismissing the proceeding for lack of jurisdiction where the petitioner's claims for refund of processing taxes failed to comply with the requirements of Section 903 of the Revenue Act of 1936, as amended, and applicable Treasury Regulations promulgated thereunder or the information called for on Form P. T. 79, and such defects had not been waived by the Commissioner of Internal Revenue.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are printed in the Appendix, *infra*, pp. 18–30.

STATEMENT

This proceeding involves a claim for refund of $145,839.12, alleged to have been paid as processing tax under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, upon the first domestic processing of wheat (R. 91). The proceeding was first instituted before the Processing Tax Board of Review by a petition filed on August 20, 1941 (R. 7–41), to review the Commissioner's disallowance of the petitioner's claim for refund of that amount.[1] An amendment to the

[1] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and its jurisdiction and functions were transferred to the Board of Tax Appeals, the name of which was in turn changed to that of The Tax Court of the United States by Section 504 (a) of the Revenue Act of 1942.

original petition was filed with the Board of Review on November 21, 1941 (R. 49–53), and on December 29, 1941, an amended petition was filed with the Board (R. 63–70). The Commissioner of Internal Revenue thereupon moved to dismiss the proceeding on jurisdictional grounds (R. 72–76, 78–79). The Commissioner's motion was denied by an order entered August 5, 1942, one member dissenting, and the Commissioner was granted leave to file an answer (R. 80–81).

The Commissioner's answer was filed with the Board of Review on August 21, 1942, and in his answer he alleged as an affirmative defense the jurisdictional grounds upon which his motion to dismiss had been based (R. 82–85).

After the Board of Review was abolished, this proceeding was transferred to The Tax Court of the United States and on January 29, 1943, the Commissioner filed with the Tax Court a new motion to dismiss on jurisdictional grounds (R. 86–90). The first ground of this motion to dismiss was, in substance, that the so-called "Amendment to Claim" attached as Exhibit C (R. 30–39) to the original petition filed with the Board of Review, which constitutes the purported claim on which the action was based, was insufficient in law to constitute a basis for such action (R. 86–89). The second ground of the motion to dismiss was that there were no evidentiary facts submitted in connection with the so-called claim from which the Commissioner could have legally de-

termined that the petitioner either paid any amount as processing tax or that it bore the burden of any amount so paid (R. 90).

In an opinion promulgated May 4, 1943 (R. 91–97), the Tax Court held that it had no jurisdiction where the claims for refund of processing taxes failed to set forth any of the information called for by the law, the regulations, and Form P. T. 79, and that such defects had not been waived by the Commissioner of Internal Revenue. An order of dismissal was entered (R. 98).

The record discloses that the Commissioner on May 23, 1941, rejected the petitioner's claim on the ground that it had not paid any amount to the Government as processing tax and on the further ground that the petitioner had not filed a valid and complete refund claim as required by Title VII of the Revenue Act of 1936 and the Treasury Regulations promulgated thereunder (R. 40–41). In appealing to the Board of Review, the petitioner alleged in its original petition that during the period of July 9, 1933, to January 6, 1936, inclusive, it was "a processor of, and processed, wheat under the name of Middleport Flour Mills, Inc., now Angelus Milling Company;" that during this period it "paid, or had paid for its account out of its own monies" processing taxes in the sum of $145,839.12. Then follows the allegation that on or about January 29, 1936, claims were filed on Form 843 by

"Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc.,"[2] for the refund of processing taxes in the total sum of $454,045.27.[3] Copies of these claims, Exhibits A–1, A–2 and A–3 (R. 11–19), unsigned, were attached to the original petition filed with the Board. (R. 7.) Each of these claims contains a statement of the amount alleged to have been paid to the Collector of Internal Revenue at Buffalo, New York, as taxes upon the processing of wheat for the respective periods covered by the several claims. These statements indicate that payment of the full amount involved for each period was made by Niagara Falls Milling Company, Inc., Lockport, New York. There is nothing in any of the claims to indicate that any part of the processing tax in question was paid by petitioner. They were filed on Form 843 rather than on Form P. T. 79 which is required by Article 601 of Treasury Regulations 96, Appendix, *infra*, p. 27. (R. 13, 16, 19.)

In its original petition (R. 7–8), and in its amended petition (R. 65), the petitioner alleges that on June 30, 1937, after enactment of the Revenue Act of 1936, Niagara Falls Milling Company, Inc., filed a claim for refund of processing tax in the sum of $436,231.73 "paid on account of the processing of wheat by it and by Petitioner" (R. 65). A copy of this claim, Exhibit

[2] Apparently the name of Middleport Flour Mills, Inc., was changed to Angelus Milling Company (R. 49, 63, 69).

[3] Similar allegations are made in the amended petition filed with the Board (R. 65–67).

B (R. 20–29), unsigned, was attached to the original petition filed with the Board. That claim indicates payment of only $436,231.73 as processing tax, and indicates that it all was paid by Niagara Falls Milling Company, Inc. (R. 24–25, 27). It does not purport to be a claim by or on behalf of the petitioner for any amount and does not indicate that any part of the amount claimed had been paid by petitioner.

In its original petition (R. 8) and in its amended petition (R. 65), the petitioner alleges that on or about August 15, 1938, it filed a claim for refund of $145,839.12 "paid out of its monies" on account of the processing of wheat by it, designating this claim as "Amendment to Claim". A copy of this so-called "Amendment to Claim", Exhibit C (R. 30–39), was attached to the original petition filed with the Board.

This so-called refund claim contained no information whatever other than a schedule (R. 32) purporting to show the total number of barrels of flour produced by both companies, the gross sales value thereof, a total processing tax computed thereon of $434,045.27, and an allocation attributing $145,839.12 of this amount to flour produced by the petitioner. In addition, the following sworn statement of allocation of liability was attached to the claim (R. 33):[4]

[4] A different allocation of this liability is set forth in allegations contained in the amendment to its original petition which the petitioner filed on November 21, 1941 (R. 49–53), and in its amended petition (R. 64–65).

The within claim for refund was originally filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc. The name of Middleport Flour Mills Inc. was changed by permission of the Secretary of State at Albany, N. Y. to Middleport Flour Mills Inc. Originally the claim in the name of both Companies was for the sum of $434,045.27.

The amount to be allocated to the Angelus Milling Company is $145,839.12 and the amount to be allocated to the Niagara Falls Milling Company is $288,206.15.

Since the filing of said claim, the Niagara Falls Milling Company was adjudicated a bankrupt on the 21st day of March, 1938. Since said date the claim of the Niagara Falls Milling Company, Inc. and the Angelus Milling Company, Inc. was handled by the same personnel, both companies having had the same officers and approximately the same directors. The Angelus Milling Company, Inc. at the present time is not bankrupt and this amended claim is presented solely on behalf of the Angelus Milling Company, Inc. and request is hereby made that the amount of refund due the Angelus Milling Company, Inc. be determined and paid to it as a separate entity and that said claim be not commingled with the claim of the Niagara Falls Milling Company. The within claim has been prepared from certain records of the two companies and is

based on data as shown by the attached Schedule A.

In addition to the foregoing allegations, the petitioner alleges in its amended petition (R. 63–67) that for the period June 9, 1933, to January 31, 1935, inclusive, joint returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company, Inc., were filed with the Collector and tax in the sum of $324,016.25 was paid on account of such processing, and that for the period February 1, 1935, to November 30, 1935, inclusive, returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company were filed in the name of Niagara Falls Milling Company and tax in the sum of $110,029.02 was paid on account of such processing (R. 63–64).

After the original petition herein was filed with the Board of Review, the Commissioner filed a "Motion for Better Statement of Claim" (R. 42–46). At a hearing before a member of the Board on this motion, certain documents were offered in evidence, the substance of which is incorporated in the "Statement of Evidence" (R. 109–129). The statement of evidence and the attached documents show that a "Monthly Return of Processor of Wheat, P. T., Form 1," was filed for each of the months from July, 1933, through January, 1935, by "Niagara Falls Milling Co. and Angelus Milling Company, Inc., * * * on account of proc-

essings of wheat * * * in the mill at *Lockport*, New York" (R. 110); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," for each of the months from February, 1935, through November, 1935; "on account of processings of wheat * * * in the mill at *Lockport*, New York" (R. 110–111); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," on account of wheat processed "in the mill at *Middleport*, New York," for each of the months from February, 1935, through November 1935 (R. 111); and that a letter (R. 125) was sent to Harry Dickson, president of both corporations by the General Deputy Collector at Buffalo, New York, requesting permission to examine the general ledgers of both corporations for the years 1935 and 1936 (*id.*). The affidavits of two certified public accountants were also offered in evidence (R. 111–112, 126–129).

The Circuit Court of Appeals affirmed the decision of the Tax Court that the claims for refund did not meet the requirements of the statute and applicable Treasury Regulations promulgated pursuant thereto. It held too that the Commissioner had not waived the inherent defects in the claims as filed. (R. 133–139.)

ARGUMENT

This action was brought under Title VII of the Revenue Act of 1936 for the refund of amounts

alleged to have been paid as processing tax under the Agricultural Adjustment Act, the taxing provisions of which were held later to be unconstitutional: *United States* v. *Butler*, 297 U. S. 1.

The remedy provided by Title VII for the recovery of such taxes is exclusive. As a condition to the allowance of a refund of such taxes the claimant is required to file a claim for refund in accordance with provisions of the statute and Treasury Regulations prescribed thereunder by the Commissioner of Internal Revenue. Section 903 (Appendix, *infra*, pp. 19-20) Treasury Regulations 96, pursuant to the authority granted by the statute, prescribe the form, P. F. Form 79, on which a claim for refund must be made and specify the facts, figures, and other data which must be submitted as a part thereof. Article 601 (Appendix, *infra*, p. 27). The claim must state the grounds for refund with supporting evidence, under oath, and must show that the claimant bore the burden of the tax and did not shift it to others. Section 902 (Appendix, *infra*, pp. 18–19); Articles 202, 204, 606 (Appendix, *infra*, pp. 26–27, 30). In case of claims for refund of amounts paid as processing taxes, the claimant is further required to submit evidence as to his average margin, as defined in the statute (Section 907, Appendix, *infra*, pp. 20–25) for the tax period in question (Article 605, Appendix, *infra*, pp. 28–30).

In the instant case, the so-called claims, Exhibits A–1, A–2 and A–3 (R. 11–19), filed in the name of Niagara Falls Milling Company, Inc., and/or Middleport Flour Mills, Inc., on Form 843 rather than on the proper form, P. T. 79, and the "Amendment to Claim", Exhibit C (R. 30–39), filed by the petitioner on P. T. 79, upon which this action is based, do not supply any of the above information. Exhibits A–1, A–2 and A–3 disclose no information except the amount of taxes paid by the Niagara Falls Milling Company, Inc., and the "Amendment to Claim", Exhibit C, merely discloses the amount of taxes paid by the petitioner, as distinguished from Niagara Falls Milling Company, Inc., on the basis of an allocation between them. The Tax Court (R. 93–95) and the Circuit Court of Appeals (R. 138–139) properly held that neither separately nor together do these claims satisfy the requirements of the statute and Treasury Regulations.

The letter of the Commissioner, Exhibit D (R. 40–41), rejected the claim for refund on the ground that the tax, refund of which was sought, was not paid by the petitioner, and that the claim did not contain a computation of the necessary margins nor did it establish that petitioner bore the burden of the tax as required by the law and regulations. The Tax Court found (R. 93) that

the information required to be stated in claims for refund of processing taxes on Form P. T. 79 had not been given.

The claim for the refund of processing taxes must contain a statement of particular information and data which are not necessary in the ordinary claim for refund of other revenue taxes. Thus this case, in essence, resolves itself into the failure of a claimant to meet prescribed requirements in connection with a claim for refund of processing taxes. The question here does not, as contended by the petitioner (Pet. 15–17), present a basic issue of great importance in the administration of the tax laws. The decisions below are based upon failure of the petitioner to present the necessary and required data in support of its claim. In fact, as pointed out by the Circuit Court of Appeals (R. 137), the question has already been resolved against the petitioner by the decision of this Court in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62. That case involved claims for refund of income taxes, as to which the requirements are, if anything, less strict than in the case of processing tax claims.

The petitioner contends that if all the claims for refund are considered together the necessary requirements have been met. But, as pointed out by the Tax Court (R. 95) and by the Circuit Court of Appeals (R. 138–139), the "Amend-

ment to Claim", Exhibit C (R. 30–39), refers expressly (R. 33) to Exhibits A–1, A–2 and A–3 (R. 11–19) which were claims filed in June, 1936, and they in turn did not comply with the necessary requirements. Furthermore, the claim, Exhibit B (R. 20–29), was not a claim for refund of taxes paid by the petitioner but by a different company, the Niagara Falls Milling Company (R. 20). There is no authority which would permit the petitioner to treat the claim filed by the Niagara Company as its own claim for purposes of filing an "Amendment to Claim". And the courts have consistently held that a claim for refund under Title VII of the Revenue Act of 1936 must be filed by the person who was liable for, and who paid the processing tax to the Government.[8] The

[8] *F. & F. Laboratories* v. *Commissioner*, 104 F. 2d 563 (C. C. A. 7th); *Oswald Jaeger Baking Co.* v. *Commissioner*, 108 F. 2d 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Southwestern Serum Co.* v. *Commissioner*, 108 F. 2d 843 (C. C. A. 10th), certiorari denied, 310 U. S. 628; *Arabi Packing Co.* v. *Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645; *Grain Belt Supply Co.* v. *Commissioner*, 109 F. 2d 490 (C. C. A. 8th), certiorari denied, 310 U. S. 648; *Zinsmaster Baking Co.* v. *Commissioner*, 109 F. 2d 738 (C. C. A. 8th), certiorari denied, 310 U. S. 653; *New Consumers Bread Co.* v. *Commissioner*, 115 F. 2d 162 (C. C. A. 3d); *Alexander Smith & Sons C. Co.* v. *Commissioner*, 117 F. 2d 974 (C. C. A. 2d); *Lindner Packing & P. Co.* v. *Commissioner*, 118 F. 2d 656 (C. C. A. 10th); *Albert Miller & Co.* v. *Commissioner*, 120 F. 2d 789 (C. C. A. 7th); *Savannah Sugar R. Corp.* v. *Commissioner*, 121 F. 2d 426 (C. C. A. 5th).

Tax Court found (R. 97, fn. 4) that the claims themselves stated that the taxes were paid by the Niagara Company and not by the petitioner.

Petitioner urges (Pet. 14, 23–24) that any defects in the claims as such were waived by the Commissioner, but the Tax Court held that there had been no waiver of the requirements (R. 96). This is also shown by the letter (R. 40) from the Commissioner rejecting the claim, and the letter (Pet. 11, R. 125) from the General Deputy Collector did not constitute such a waiver (R. 96). That letter requested permission to examine the books in connection with Claim F. 5899, a claim for refund filed by the Niagara Falls Milling Company. The claim of the petitioner was Claim F. 10130 (R. 96). The Circuit Court of Appeals held petitioner's assertion of estoppel to be without merit (R. 135–136, 138).

In the absence of a waiver by the Commissioner, technical requirements in connection with a claim for refund of taxes must be met and the Commissioner has no authority to waive the positive requirements of the statute. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 533. The courts are all in agreement that that principle applies to refunds under Title VII of the Revenue Act of 1936. *Lee Wilson & Co.* v. *Commissioner*, 111 F. 2d 313, 317–318 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner*, 123 F. 2d 232, 234–235 (C. C. A. 8th); *Landrum* v. *Commissioner*, 122 F. 2d 857, 859 (C. C. A. 8th); *Tennessee Consolidated*

C. Co. v. *Commissioner*, 117 F. 2d 452, 454 (C. C. A. 6th); *Samara* v. *United States*, 129 F. 2d 594, 597 (C. C. A. 2d), certiorari denied, 317 U. S. 686; *Cudahy Packing Co.* v. *United States*, 126 F. 2d 429 (C. C. A. 7th).

There is no actual conflict of decisions as asserted by the petitioner (Pet. 18–21). None of the cases relied upon involved a refund of processing taxes, and *United States* v. *Humble Oil & Refining Co.*, 69 F. 2d 214 (C. C. A. 5th), merely holds that the Commissioner may waive strict compliance with regulations requiring that all facts relied upon must be stated in the claim for refund. Unlike the instant case, it appears that there the Commissioner had in fact decided the claim on the merits and actually determined the amount of the overpayment in tax. Clearly, no conflict can be based on the Court of Claims decision in *Memphis Cotton Oil Co.* v. *United States*, 59 F. 2d 276 (C. Cls.), which this Court [illegible] (288 U. S. 72, 73) None of the district court cases cited by petitioner (Pet. 20) is in conflict with this case.[6] All deal

[6] *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 F. 2d 459 (E. D. Pa.), held that the Commissioner could waive any defect or informality in a claim for refund. *Wunderle* v. *McCaughn*, 38 F. 2d 258 (E. D. Pa.), appears to be inconsistent with *Real Estate Title Co.* v. *United States*, 309 U. S. 13, but in any event all facts and circumstances were fully set out in the claim, though the claim was based upon the erroneous legal theory of a deductible bad debt instead of a deduction for business expenses. *Weihman* v. *United States*, 4 F. Supp. 155 (E. D. Pa.), also held that the Commissioner could waive and had waived the insufficiency of the claim.

with situations where there had been a waiver of the insufficiency of the claim or all the facts were before the Commissioner. As was previously stated, the finding in the instant case is that there had been no such waiver (R. 96), and the required information had not been made available.

Contrary to the petitioner's assertion (Pet. 21–22), the decisions below in no way depart from but instead follow the principles laid down by this Court in *Tucker* v. *Alexander*, 275 U. S. 228; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; and *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73. The first case held the objection that the ground of recovery was not sufficiently specified could be and had been waived by stipulation of the parties. Cf. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269. The last two cases held that a claim for refund may be timely amended before final rejection by the Commissioner. In the instant case, however, there was no sufficient claim or amendment before rejection. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337 (Pet. 22), recognizes that the provisions of Title VII, prescribing the conditions under which refunds of processing taxes may be secured are constitutional and must be met by a showing that the claimant bore the burden of the tax and did not shift it to others.

CONCLUSION

The decisions below are correct and there is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. (7 U. S. C., Sec. 623.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any com-

modity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862]. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Ad-

justment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C., Sec. 645.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during

such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting proce-

dure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to

provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that

the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or col-

lected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. Sec. 649.)

Revenue Act of 1942, c. 619, 56 Stat. 798:[1]

SEC. 510. ABOLITION OF BOARD OF REVIEW AND TRANSFER OF JURISDICTION TO BOARD OF TAX APPEALS.

(a) Effective as of the close of business on December 31, 1942, the Board of Review, established under section 906 (b) of the Revenue Act of 1936, is hereby abolished and the jurisdiction vested in said Board of Review is hereby transferred to and vested in the Board of Tax Appeals.

* * * * * *

(c) All proceedings pending in the said Board of Review on December 31, 1942, shall be deemed pending in and be trans-

[1] The name of the Board of Tax Appeals was changed by Section 504 of the Revenue Act of 1942 to The Tax Court of the United States.

ferred forthwith to the Board of Tax Appeals, and shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein.

(d) All journals, dockets, books, files, records, and property, including office equipment of the said Board of Review, shall be transferred to the Board of Tax Appeals.

(e) Section 902 of the Revenue Act of 1936 (relating to conditions on allowance of refunds) is amended by striking out "Board of Review" and inserting in lieu thereof "Board of Tax Appeals (hereinafter referred to as the 'Board')".

* * * * *

(7 U. S. C. Supp. III, Sec. 648.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incum-

bent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 601. *Claim form prescribed.*—Claims for refunds of amounts paid as processing tax (as defined in section 913 (b) of the Act) shall be filed on P. T. Form 79. (See Chapter II of these regulations for general provisions relating to all claims.)

ART. 603. *Payment of tax.*—The claimant shall set forth in the claim complete data with respect to the amount of proc-

essing tax which he has paid on the processing of the commodity. Each claim shall show as to each month's processing of the commodity: (1) the total tax liability returned; (2) the total amount of tax paid on the first domestic processing of the commodity; (3) the date and amount of each payment and the month for which paid; (4) that part of the total amount paid which represented the processing of the commodity for a customer for a charge or fee ("custom processing tax," see Chapter V of these regulations); (5) that part of the total amount paid which represented processing tax, as defined in section 913 (b) of the Act; and (6) the collector to whom each payment was made. In the case of tobacco the above data respecting tax payment shall be shown separately with respect to each market classification.

ART. 605. *Evidence as to margins.*—Section 907 of the Act provides that in claims for refund of amounts paid as processing tax it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin per unit of such commodity was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

There shall be submitted with, and as a part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax. (For

definition of "tax period" and "period before and after the tax," see section 907 (c) of the Act.)

The average margin for the tax period shall be computed as follows: Determine for each month during the period (1) the gross sales value of articles derived from the commodity processed during such month; (2) the cost of the commodity processed during such month; (3) the amount of processing tax paid with respect to the quantity of the commodity processed during the month; and (4) the number of units of the commodity processed during the month. The sum of the monthly gross sales values for all months during the period minus the sum of the monthly costs of the commodity processed for all months during the period, minus the sum of the processing taxes paid for all months during the period, and divided by the sum of the number of units of the commodity processed during all the months comprising the period is the average margin for such period. (For definition of "cost of commodity" and "gross sales value," see section 907 (b), paragraphs (5) and (6), respectively, of the Act.)

The average margin for the period before and after the tax shall be computed in the same manner as the average margin for the tax period, except that the processing tax does not enter into the computation.

In determining the average margin for the tax period, the "number of units of the commodity processed" shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "cost of the commodity processed" shall be the cost of the number

of units of the commodity with respect to which the claimant actually paid the processing tax; the "gross sales value of articles" shall be the gross sales value of articles processed from the number of units of the commodity with respect to which the claimant actually paid the processing tax.

In support of such statement there shall be submitted, verified by appropriate affidavit, a detailed showing of the manner in which the margins for each month and the average margins for each period were ascertained, the data and records on which they were based, the location of such data and records, and all other related matters, including the accounting procedure of the claimant, which entered into the computations of such margins. All elements, factors, units, or measures entering into the computation of such margins, and any departure from uniformity in the use thereof in making such computation for any part of either period, must be fully explained and justified.

ART. 606. *Other evidence.*—In addition to the showing as to margins, the claimant is privileged to submit with his claim any other evidence available to him tending to establish that he bore the burden of the tax. Such evidence may be submitted to support the prima facie presumption, if such presumption is in favor of the claimant, or to rebut such presumption if it is against him. (See section 902 and subsection (e) of section 907 of the Act.)

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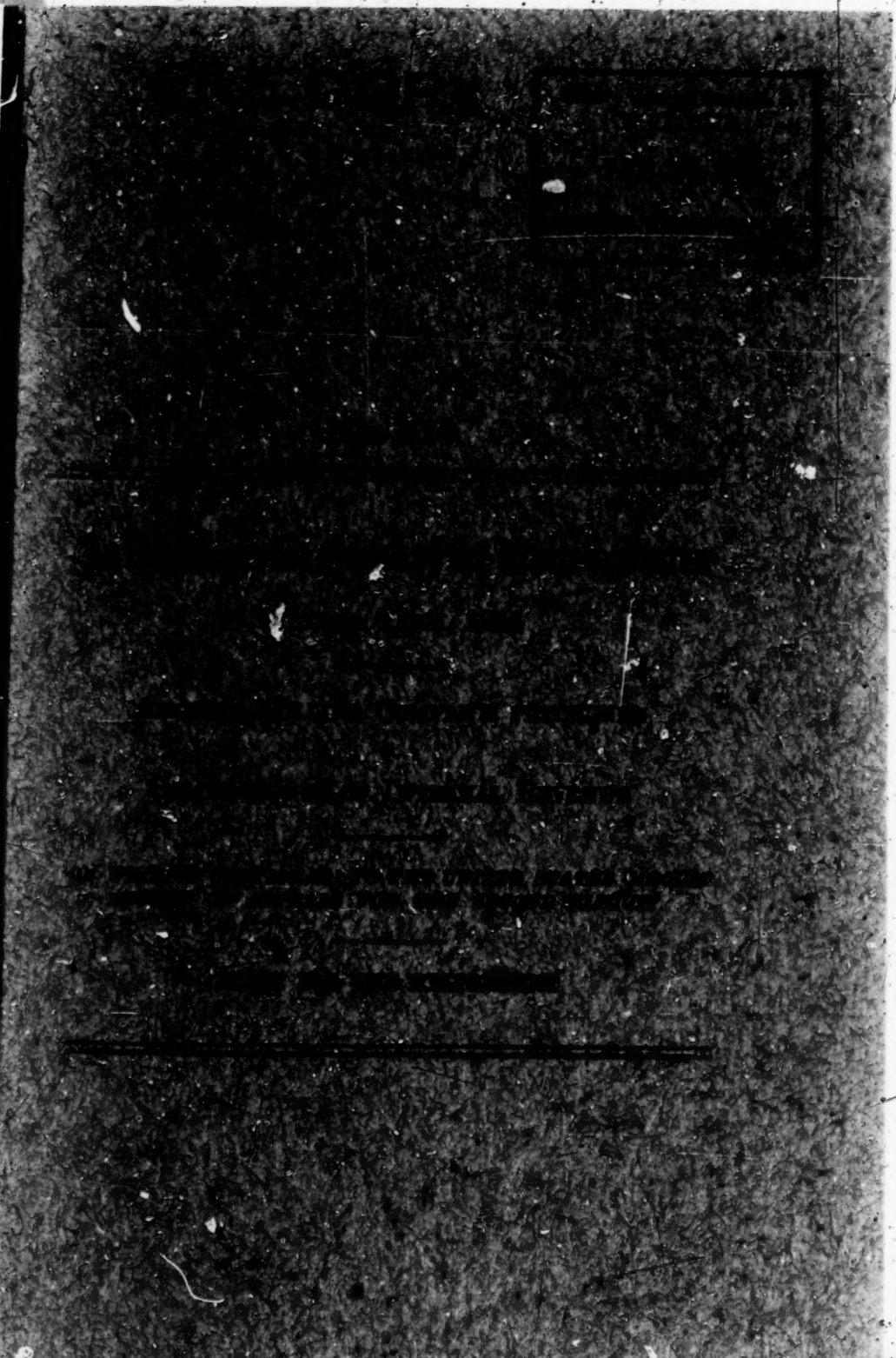

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Act of August 24, 1935, c. 641, 49 Stat. 750 13

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Sec. 901 (7 U. S. C. 1940 ed., Sec. 623) 40

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Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 405 (7 U. S. C. 1940 ed., Sec. 645) 14

Revenue Act of 1942, c. 619, 56 Stat. 798:

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Art. 606 18, 52

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 610

ANGELUS MILLING COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of The Tax Court of the United States (R. 91–97) is reported at 1 T. C. 1031. The opinion of the Circuit Court of Appeals (R. 133–139) is reported at 144 F. 2d 469.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming that of the Tax Court, was entered on July 24, 1944. (R. 139.) The case was decided and the opinion of the court was filed on July 6, 1944. (R. 133.) The petition for a writ of certiorari was filed October 18, 1944, and was

granted on December 4, 1944.[1] (R. 140.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner does not contend that a proper claim for refund of processing taxes is not a prerequisite to the Tax Court's jurisdiction. Therefore the questions presented are:

1. Whether the petitioner's claim "clearly set forth under oath all evidence relied upon in support" of the claim as required by Section 903 of the Revenue Act of 1936, as amended, and whether it conformed to the applicable Treasury Regulations as required by Section 902.

2. Whether any defects in the claim were waived by the Commissioner of Internal Revenue.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*, pp. 40–52.

STATEMENT

This proceeding involves a claim for refund of $145,839.12, alleged to have been paid as processing tax under the Agricultural Adjustment Act,

[1] The same question of whether the petition for certiorari was filed in time arises in this case as in *Commissioner* v. *Estate of Edward T. Bedford*, No. 710, October Term, 1944, where the Government contends that the petition was filed within time under similar circumstances.

c. 25, 48 Stat. 31, as amended, upon the first domestic processing of wheat. (R. 91.) The proceeding was first instituted before the Processing Tax Board of Review by a petition filed on August 20, 1941 (R. 7–41), to review the Commissioner's disallowance of the petitioner's claim for refund of that amount.[2] An amendment to the original petition was filed with the Board of Review on November 21, 1941 (R. 49–53), and on December 29, 1941, an amended petition was filed with the Board (R. 63–70). The Commissioner of Internal Revenue thereupon moved to dismiss the proceeding on jurisdictional grounds. (R. 72–76, 78–79.) The Commissioner's motion was denied by an order entered August 5, 1942, one member dissenting, and the Commissioner was granted leave to file an answer. (R. 80–81.)

The Commissioner's answer was filed with the Board of Review on August 21, 1942, and in his answer he alleged as an affirmative defense the jurisdictional grounds upon which his motion to dismiss had been based. (R. 82–85.)

After the Board of Review was abolished, this proceeding was transferred to The Tax Court of the United States and on January 29, 1943, the Commissioner filed with the Tax Court a new

[2] The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and its jurisdiction and functions were transferred to the Board of Tax Appeals, the name of which was changed to The Tax Court of the United States by Section 504 (a) of the Revenue Act of 1942.

motion to dismiss on jurisdictional grounds. (R. 86–90.) The first ground of this motion to dismiss was, in substance, that the so-called "Amendment to Claim" attached as Exhibit "C" (R. 30–39) to the original petition filed with the Board of Review, which constituted the purported claim on which the action was based, was insufficient in law to constitute a basis for such action (R. 86–89). The second ground of the motion to dismiss was that there were no evidentiary facts submitted in connection with the so-called claim from which the Commissioner could legally have determined that the petitioner either paid any amount as processing tax or that it bore the burden of any amount so paid. (R. 90.)

In an opinion promulgated May 4, 1943 (R. 91–97), the Tax Court held that it had no jurisdiction, since the several claims for refund of processing taxes upon which petitioner relied failed to set forth any of the information called for by the law, the regulations, and Form P. T. 79, and that such defects had not been waived by the Commissioner of Internal Revenue. An order of dismissal was entered. (R. 98.) The Circuit Court of Appeals affirmed the order of the Tax Court. (R. 139.)

The record discloses that the Commissioner on May 23, 1941, rejected the petitioner's claim on the ground that it had not paid any amount to the Government as processing tax and on the further ground that the petitioner had not filed

a valid and complete refund claim containing margins or other evidence establishing that petitioner bore the burden of the tax as required by Title VII of the Revenue Act of 1936 and the Treasury Regulations promulgated thereunder. (R. 40–41.) In appealing to the Board of Review, the petitioner alleged in its original petition that during the period of July 9, 1933, to January 6, 1936, inclusive, it was "a processor of, and processed, wheat under the name of Middleport Flour Mills, Inc., now Angelus Milling Company;" that during this period it "paid, or had paid for its account out of its own monies" processing taxes in the sum of $145,839.12. Then followed the allegation that on or about January 29, 1936, claims were filed on Form 843 by "Niagara Falls Milling Co., Inc., and/or Middleport Flour Mills, Inc.,"[3] for the refund of processing taxes in the total sum of $454,045.27.[4] Alleged copies of these claims, Exhibits A–1, A–2, and A–3 (R. 11–19), were attached to the original petition filed with the Board (R. 7). The claims were filed on or about June 22, 1936.[5] (R. 93.) They

[3] Apparently the name of Middleport Flour Mills, Inc., was changed to Angelus Milling Company. (R. 49, 63, 69.)

[4] Similar allegations are made in the amended petition filed with the Board. (R. 65–67.) The figure $454,045.27 is in error. The correct figure is $434,045.27, the aggregate of the amounts stated on the face of the three claims.

[5] The Revenue Act of 1936 which alone authorized the filing of claims for the refund of processing taxes paid was approved by the President at 9:00 P. M., June 22, 1936.

were on Form 843 rather than on Form P. T. 79 which is required by Article 601 of Treasury Regulations 96 (Appendix, *infra*). (R. 11, 14, 17.)

In its original petition (R. 7–8), and in its amended petition (R. 65), the petitioner alleges that on June 30, 1937, after enactment of the Revenue Act of 1936, Niagara Falls Milling Company, Inc., filed a claim for refund of processing tax in the sum of $436,231.73 "paid on account of the processing of wheat by it and by Petitioner" (R. 65). An alleged copy of this claim, Exhibit "B" (R. 20–29), was attached to the original petition filed with the Board. The claim shows on its face that processing taxes of $436,231.73 were paid by Niagara Falls Milling Company, Inc. (R. 24–25, 27.)

In its original petition (R. 8) and in its amended petition (R. 65), the petitioner alleges that on or about August 15, 1938, it filed a claim for refund of $145,839.12 "paid out of its monies" on account of the processing of wheat by it, designating this claim as "Amendment to Claim". A copy of this so-called "Amendment to Claim" (Exhibit "C", R. 30–39), was attached to the original petition filed with the Board.

This claim contained a schedule (R. 32) purporting to show the total number of barrels of flour produced by Niagara Falls Milling Company and Middleport Flour Mills, Inc. (now Angelus Milling Company, Inc.), the gross sales value

thereof, a total processing tax computed thereon of $434,045.27, and an allocation attributing $145,839.12 of this amount to flour produced by the petitioner. In addition, the following sworn statement of allocation of liability was attached to the claim (R. 33):*

> The within claim for refund was originally filed on the 22d day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc. The name of Middleport Flour Mills, Inc. was changed by permission of the Secretary of State at Albany, N. Y. to Middleport Flour Mills Inc. [sic.]. Originally the claim in the name of both Companies was for the sum of $434,045.27.
>
> The amount to be allocated to the Angelus Milling Company is $145,839.12 and the amount to be allocated to the Niagara Falls Milling Company is $288,206.15.
>
> Since the filing of said claim, the Niagara Falls Milling Company was adjudicated a bankrupt on the 21st day of March, 1938. Since said date the claim of the Niagara Falls Milling Company, Inc. and the Angelus Milling Company, Inc. was handled by the same personnel, both companies having had the same officers and approximately the same directors. The Angelus Milling Company, Inc. at the present time

* A different allocation of this liability is set out in allegations contained in the amendment to its original petition which the petitioner filed on November 21, 1941 (R. 49–53), and in its amended petition (R. 64–65).

> is not bankrupt and this amended claim is presented solely on behalf of the Angelus Milling Company, Inc. and request is hereby made that the amount of refund due the Angelus Milling Company, Inc. be determined and paid to it as a separate entity and that said claim be not commingled with the claim of the Niagara Falls Milling Company. The within claim has been prepared from certain records of the two companies and is based on data as shown by the attached Schedule A.

In addition to the foregoing allegations, the petitioner alleges in its amended petition (R. 63–67) that for the period July 9, 1933, to January 31, 1935, inclusive, joint returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company, Inc., were filed with the Collector and tax in the sum of $324,616.25 was paid on account of such processing, and that for the period February 1, 1935, to November 30, 1935, inclusive, returns on account of the processing of wheat by the petitioner and Niagara Falls Milling Company were filed in the name of Niagara Falls Milling Company and tax in the sum of $110,029.02 was paid on account of such processing (R. 63–64).

After the original petition was filed with the Board of Review, the Commissioner filed a motion for better statement of claim with reference to the allegations of the petition (R. 42–46.) That motion was denied and the petitioner was

granted leave (R. 71) to file an amended petition (R. 63–70). At a hearing certain documents were offered in evidence, the substance of which is incorporated in the "Statement of Evidence". (R. 109–129.) The statement of evidence and the attached documents show that a "Monthly Return of Processor of Wheat, P. T., Form 1," was filed for each of the months from July, 1933, through January, 1935, by "Niagara Falls Milling Co. and Angelus Milling Company, Inc., * * * on account of processings of wheat * * * in the mill at *Lockport,* New York" (R. 119); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," for each of the months from February, 1935, through November, 1935, "on account of processings of wheat * * * in the mill at *Lockport,* New York" (R. 110–111); that a "Monthly Return of Processor of Wheat, P. T. Form 1," was filed by "Niagara Falls Milling Co.," on account of wheat processed "in the mill at *Middleport,* New York," for each of the months from February, 1935, through November, 1935 (R. 111); and that a letter (R. 125) was sent to Harry Dickson, president of both corporations by the General Deputy Collector at Buffalo, New York, requesting permission to examine the general ledgers of the Angelus and Middleport corporations for the years 1935 and 1936 (*id.*). The affidavits of two certified public accountants

were also offered in evidence. (R. 111–112, 126–129.)

The Tax Court held that the claims for refund did not meet the requirements of the statute and applicable Treasury Regulations promulgated pursuant thereto. (R. 95–96.) It also held (R. 95–97) that the Commissioner had not waived any defects in the claims as filed. It therefore dismissed the proceedings for lack of jurisdiction. (R. 98.) The Circuit Court of Appeals affirmed. (R. 133–139.)

SUMMARY OF ARGUMENT

This action was brought under Title VII of the Revenue Act of 1936 for the refund of amounts alleged to have been paid as processing tax under the Agricultural Adjustment Act, the taxing provisions of which had been held to be unconstitutional. The remedy provided by Title VII for the recovery of such taxes is exclusive. As a condition of the allowance of a refund of such taxes a claimant is required by the statute to file a claim for refund in accordance with provisions of the statute and regulations prescribed thereunder by the Commissioner of Internal Revenue, stating the grounds of the claim, and supported by all the evidence, under oath, relied upon to show that it bore the burden of the tax and did not shift it to others. The claimant is further required to submit evidence of average margins, as defined in the statute, for the tax period and the statutory

base period. The statute creates a presumption, based upon a comparison of the margins, as to the extent to which the burden of the tax was borne by the claimant. Regulations promulgated pursuant to authority granted by the statute prescribe the form on which a claim for refund must be made and specify the nature of the evidence which must be submitted as a part of the claim for refund.

An action for recovery of taxes erroneously or illegally collected can be maintained against the Government only upon strict compliance with the statutory conditions under which the Government consents to be sued. Compliance with such conditions is jurisdictional. In this case the so-called claim for refund upon which the action is based does not satisfy the requirements of the applicable provisions of the Revenue Act of 1936 and the regulations promulgated thereunder, since neither the original claim, filed jointly by petitioner and Niagara Falls Milling Co. (Exhibits A–1, A–2 and A–3, R. 11–19), nor the "Amendment to Claim" (Exhibit "C," R. 30–39) show that petitioner paid any tax or contain the evidence relied upon to sustain a recovery, but merely allocate to the petitioner an amount of refund said to be due to it for taxes paid by the Niagara Falls Milling Co. Petitioner's attempt to separate its claim from that of the Niagara Falls Milling Co. (R. 33) precludes resort to that company's separate claim (R. 20–29) for supporting data, the applicability of which

could not in any case be determined from the claims.

The Commissioner of Internal Revenue may not waive any failure to comply with statutory requirements for the maintenance of an action against the Government for refund of taxes. In the instant case the Tax Court has found that the requirements were not in fact waived. That is essentially a question for final determination by the Tax Court. There is nothing in the record to demonstrate that the Commissioner did or could make a determination upon petitioner's claim from the data available to him.

The Tax Court was without jurisdiction for the further reason that the claim does not show the petitioner paid any amount to the Government as tax under the Agricultural Adjustment Act. Such a failure of proof is fatal to any claim.

ARGUMENT

I

TITLE VII OF THE REVENUE ACT OF 1936 PROVIDES THE EXCLUSIVE REMEDY FOR RECOVERY OF AMOUNTS PAID AS TAX UNDER THE AGRICULTURAL ADJUSTMENT ACT

The proceeding is to recover amounts alleged to have been paid by or on behalf of the petitioner as processing tax imposed under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, upon the first domestic processing of wheat. The taxing provisions of that Act were held unconstitutional in *United States* v. *Butler*, 297 U. S. 1,

and *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110.[7] Thereafter Congress enacted the Revenue Act of 1936, Title VII of which (comprising Sections 901 to 917, inclusive) authorizes the refund, subject to certain conditions and limitations, of amounts paid as tax under the Agricultural Adjustment Act.[8]

The remedy provided by Title VII of the 1936 Act for the recovery of taxes paid under the Agricultural Adjustment Act is exclusive. Section 902 of Title VII (Appendix, *infra*) provides that no refund shall be made or allowed of any amount paid as tax under the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of the Commissioner, "in accordance with regulations prescribed by him", or to the satisfac-

[7] That case held that amendments to the taxing provisions of the Act made by the Act of August 24, 1935, c. 641, 49 Stat. 750, did not cure its defects.

[8] Section 9 of the Agricultural Adjustment Act, as amended, authorized the imposition of a processing tax upon the first domestic processing of the basic agricultural commodities designated in Section 11, as amended, and Section 15 (d) authorized the imposition of a similar tax upon the first domestic processing of competing commodities; Section 16 of the Act, as amended, authorized the simultaneous imposition of a so-called floor stocks tax upon articles processed wholly or in chief value from a basic or competing commodity and held for sale or other disposition; Section 15 (e) of the Act, as amended, authorized the imposition of a compensating tax upon the importation of articles manufactured wholly or partly from such a commodity. The refund of all such taxes is governed by the applicable provisions of Title VII of the Revenue Act of 1936.

tion of the trial court or, in the case of processing taxes, of the Board of Review, that he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, in any manner whatsoever.[9]

Section 903 of Title VII, as amended (Appendix, *infra*), provides that no such refund shall be made or allowed unless, "after the enactment of this Act, and prior to July 1, 1937,[10] a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary". The section further provides that "All evidence relied upon in support of such claim shall be clearly set forth under oath". The Commissioner was also authorized to prescribe by regulation the number of claims which may be filed by any claimant with respect to the total amount paid as tax under the Agricultural Adjustment Act and to require that claims for refund of amounts paid with respect to any commodity or group of commodities should cover the entire period for which such taxes were paid. In addition to this provision, Section 916 of Title VII authorized the Commissioner, with the approval of the Secretary, to "prescribe such

[9] This section refers to the burden of the tax in the broad economic sense of the term. *Cudahy Packing Co. v. United States*, 126 F. 2d 429 (C. C. A. 7th).

[10] The time for filing such claims was extended by Section 405 of the Revenue Act of 1939, c. 247, 53 Stat. 862, to January 1, 1940.

rules and regulations as may be deemed necessary to carry out the provisions of this title".

The district courts and the Court of Claims were given concurrent jurisdiction of suits for refund of amounts paid as floor stocks tax, and compensating tax,[11] and the Processing Tax Board of Review was created by Section 906 of the 1936 Act and given exclusive jurisdiction to review the Commissioner's allowance or disallowance of claims for refund of amounts paid as processing tax under the Agricultural Adjustment Act. The Circuit Courts of Appeals were given jurisdiction to review decisions of the Board of Review, with further review by the Supreme Court on certificate or certiorari.[12]

Section 907 of the 1936 Act (Appendix, *infra*) provides that where the refund claimed is for an amount paid as processing tax under the Agricultural Adjustment Act it shall be *prima facie* evidence that the burden of such amount was borne by the claimant to the extent that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. But if the average margin was not lower during the tax period it is *prima facie* evidence

[11] See Section 905 of the 1936 Act. Section 910 of the Act prohibited such suits against collectors of internal revenue.

[12] See Section 906 (g) of the 1936 Act, amended by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

that none of the burden of the processing tax was borne by the claimant but that it was shifted to others. The section then defines the terms "tax period" and "period before and after the tax" as there used and prescribes the manner in which the "margins" for each period shall be computed. Subsection (e) of Section 907 then provides that either the claimant or the Commissioner "may rebut the presumption established by subsection (a) * * * by proof of the actual extent to which the claimant shifted to others the burden of the processing tax", and specifies certain matters which shall be considered as evidence of the actual extent to which the tax burden was borne or shifted by the Claimant. *Webre Steib Co., Ltd.* v. *Commissioner,* No. 148, decided February 12, 1945.

Pursuant to the provisions of the 1936 Act the Commissioner promulgated Treasury Regulations 96, relating to claims for refund under Title VII of the Act. Article 201 of Treasury Regulations 96 (Appendix, *infra*) provides that claims for refund under Title VII "shall be made on the prescribed forms", and that they "shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations". Article 202 (Appendix, *infra*) provides:

> Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the

> claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.
>
> The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

A separate form was prescribed by the regulations for use in preparing a claim for refund of each type of tax subject to the provisions of Title VII of the 1936 Act. Article 601 of Treasury Regulations 96 (Appendix, *infra*) requires that claims for refund of amounts paid as processing tax be prepared on P. T. Form 79. Article 602 provides that a separate claim shall be filed with respect to each commodity on the processing of which a processing tax was paid, and that only one claim shall be filed by any person with respect to the total amount paid as processing tax on the processing of a single commodity. Article 603 (Appendix, *infra*) provides that the claimant "shall set forth in the claim complete data with respect to the amount of processing tax which he has paid on the processing of the commodity", and each claim is required to show the total tax liability returned, the total amount paid, the

date and amount of each payment and month for which paid, the portion which represents tax on custom processing, the portion which represents processing tax as defined in Section 913 (b) of the 1936 Act, and the Collector to whom paid.[13]

Article 605 of Treasury Regulations 96 (Appendix, *infra*), relating to the *prima facie* determination required by Section 907 of the Act, provides that "There shall be submitted with, and as part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax". The article then outlines the method of computing the margins required by the statute for determining the *prima facie* extent to which the tax burden was borne by the claimant.[14] Article 606 (Appendix, *infra*) provides that the claimant may submit with the claim any other available information tending to establish that it bore the burden of the tax.[15]

These provisions indicate the complexity of the problem and the elaborate plans made by the Government to deal with it. The Commissioner was fully justified in requiring that the necessary information be supplied in a uniform manner

[13] An appropriate schedule for listing this information was made a part of the prescribed refund claim P. T. Form 79 (R. 31.)

[14] Appropriate schedules for listing this information and making the necessary marginal comparisons are made a part of the prescried P. T. Form 79. (R. 35–37.)

[15] An appropriate space is provided in P. T. Form 79 for incorporating such evidence. (R. 37.)

and with sufficient completeness to permit it to be promptly handled and verified. This Court has held that similar reasons justified the Commissioner in requiring a separate return for a special class of income. *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219, 223. The method of claiming processing tax refunds under the Revenue Act of 1936, thus validly prescribed, is obviously the exclusive method, with which claimants must comply.

II

THE PETITIONER FAILED TO COMPLY WITH THE CONDITIONS PRECEDENT TO THE MAINTENANCE OF THIS ACTION

Since there was a failure to satisfy the valid requirements of the statute and regulations, and the failure involved a matter which is a prerequisite to suit, the Tax Court was without jurisdiction.

This was one of the grounds of the Commissioner's rejection of the claim for refund (R. 40–41); it was urged in support of the motion to dismiss (R. 86–90); and it was the ground on which the Tax Court dismissed the proceeding (R. 91–98) and the Circuit Court of Appeals affirmed (R. 138–139). We submit that the decision of the courts below on this question was correct.

It is elementary that the sovereign is not suable of right. *United States* v. *Clarke*, 8 Pet. 436,

443–444; *Lynch* v. *United States*, 292 U. S. 571, 580; *Dismuke* v. *United States*, 297 U. S. 167, 171–172. As a corollary it is well settled that suits for the recovery of taxes illegally collected may be maintained against the Government only under such conditions and subject to such limitations as the Congress shall prescribe, and those conditions must be complied with strictly. *Collector* v. *Hubbard*, 12 Wall. 1; *Cheatham* v. *United States*, 92 U. S. 85; *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141; *United States* v. *Michel*, 282 U. S. 656; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386; *Anniston Mfg. Co.*, v. *Davis*, 301 U. S. 337. The rule is strictly applied and this Court has said that an action "may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel*, *supra*, p. 659. "If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with." *Rock Island &c. R. R.* v. *United States*, *supra*, p. 143. Cf. *Collector* v. *Hubbard*, *supra*.

It has been uniformly held that compliance with the conditions upon which the Government has consented to be sued is jurisdictional. See *United States* v. *Chicago Golf Club*, 84 F. 2d 914 (C. C. A. 7th); *Arabi Packing Co.* v. *Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645; *Alexander Smith & Sons C. Co.* v. *Commissioner*, 117 F. 2d 974 (C. C. A. 2d).

The petitioner is proceeding under the provisions of Title VII of the Revenue Act of 1936, the material portions of which, together with the material portions of Treasury Regulations 96 prescribed thereunder, are reviewed above. It is clear from these provisions that a condition precedent to the maintenance of an action against the Government for recovery of an amount paid as processing tax under the Agricultural Adjustment Act is the filing of a timely claim, after enactment of the 1936 Act and prior to the expiration of the time fixed by Section 903, as amended, and that it must contain the data called for by the statute and the Regulations, including the margin data required by Section 907 of the Act for determining the *prima facie* extent to which the claimant bore the burden of the tax and any other data available to him which would tend to show the "actual extent" to which he bore the burden of the processing tax if the margin computations under Section 907 of the Act are unfavorable to him.

In this case the only condition prescribed by Title VII and the Treasury Regulations with which the petitioner complied was the timely filing of an official P. T. Form 79, designated "Amendment to Claim" (Exhibit "C", R. 30–39), in which it demanded a refund of $145,839.12. It gave none of the data required by the statute, the regulations, or the several schedules which were a part

of the official form. None of the schedules provided on the form for furnishing the information required by the statute and the Regulations were filled in. (R. 30–39.) The only information furnished, other than the name and address of the claimant and the amount of refund claimed, was a schedule purporting to be an allocation between the petitioner and Niagara Falls Milling Company of the total amount of processing taxes paid by Niagara[16] to the Collector of Internal Revenue (R. 32), and a statement (R. 33) which furnishes none of the data required by the statute and the regulations. The figures shown in this purported allocation (R. 32) do not correspond to the amounts alleged in the amendment to the original petition (R. 51–52) and in the amended petition (R. 64–65), as having been paid on account of the processing done by the petitioner. Petitioner's claim says (R. 33) the claim originally was filed June 22, 1936, "in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc.," for the sum of $434,045.27.[17] This is the aggregate amount of the claims (Exhibits A–1, A–2, A–3, R. 11–19) filed on Form 843. The original petition and the amended petition both allege these claims were filed on or about January 29,

[16] The Tax Court found (R. 97), "The claims state that the tax was paid by Niagara."

[17] It should be noted that the petitioner (Br. 10) misstates this figure as being $454,045.27.

1936.[18] (R. 7–8, 65.) The only information furnished in the original claims on Form 843 (R. 11–19) is the name and address of the joint claimants, and a statement of the dates and amounts of the payments made to the Collector by Niagara Falls Milling Company.

Clearly the "Amendment to Claim" (Exhibit "C", R. 30–39) is not a sufficient claim under the statute and regulations to constitute a basis for suit against the Government, and we do not understand the petitioner to contend otherwise. It is no more a claim for refund which satisfied the requirements of the statute and the regulations than were the documents filed as claims in *Jaubert Bros.* v. *United States,* 141 F. 2d 206 (C. C. A. 5th); *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. 2d 452 (C. C. A. 6th); *Landrum* v. *Commissioner,* 122 F. 2d 857 (C. C. A. 8th); and *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th). In all of these cases, as in the instant case, the Commissioner moved to dismiss the proceeding for lack of jurisdiction on the ground that the purported claim for refund did not sufficiently comply with the requirements of the statute and

[18] The Tax Court found they were filed on or about June 22, 1936. (R. 93.) The Revenue Act of 1936 became a law at 9:00 P. M., June 22, 1936. This is the reason why the claims (Exhibits A–1, A–2, and A–3, R. 11, 14, 17) were filed on Form 843.

regulations to constitute a basis for an action against the Government. In each case this contention was sustained, the court holding there was no error in dismissing the proceeding for lack of jurisdiction.

There is an abundance of support for dismissal of the petition on account of the insufficiency of the statements in the claims filed under Title VII of the 1936 Act. See *New York Handkerchief Mfg. Co.* v. *United States,* 142 F. 2d 111 (C. C. A. 7th), certiorari denied October 9, 1944; *18th Street Leader Stores* v. *United States,* 142 F. 2d 113 (C. C. A. 7th), certiorari denied October 9, 1944; *Samara* v. *United States,* 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686; *Weiss* v. *United States,* 135 F. 2d 889 (C. C. A. 7th); *Jaubert Bros.* v. *United States,* 141 F. 2d 206 (C. C. A. 5th); *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th); and *Caldwell Sugars* v. *United States,* 54 F. Supp. 544, 552 (C. Cls.)

Since petitioner's "Amendment to Claim" (Exhibit "C", R. 30-39) is not of itself sufficient to constitute a basis for this action, it is necessary to determine whether it is sufficient as an amendment to a prior claim timely filed.

Petitioner does not argue that its "Amendment to Claim" complies with the requirements of the statute and the regulations. It does not in its brief take a definite position as to whether

the "Amendment to Claim" filed by it on P. T. Form 79 is an amendment to the joint claims filed on Form 843 or is an amendment to the separate claim (Exhibit "B", R. 20–29) filed on P. T. Form 79 by Niagara Falls Milling Company. The basis of its argument is that if all the claims for refund filed by petitioner and Niagara be considered together, petitioner's claim is not defective. The theme reiterated throughout the brief is that the claims considered together gave all of the basic data and that, since the Commissioner is said to have known of the interrelationship of the companies, any defects were waived. The entire argument is in generalities and much of it is not supported by the record. Especially is there no support for the repeated and emphatic assertions that the Commissioner had all of the data necessary to pass upon the petitioner's claim on its merits.

If petitioner's "Amendment to Claim" (Exhibit "C", R. 30–39) is to be considered as an amendment to the joint claims filed on Form 843 (Exhibits A–1, A–2 and A–3, R. 11–19) it obviously is inadequate as a basis for suit against the Government because the earlier claims likewise fail clearly to set forth all supporting evidence relied upon. The Tax Court held that the "Amendment to Claim" filed by the petitioner "must have been intended as an amendment to the claims represented" in Exhibits A–1, A–2 and A–3 (R. 93), which were filed in the joint names

of the companies on Form 843. This conclusion is fully justified by the statement (R. 33) attached to the "Amendment to Claim". The amount of $434,045.27[19] referred to therein is the same as the aggregate amount referred to in the claims filed on Form 843, but is different from the amount of $436,231.73 demanded in the claim filed on P. T. Form 79 by Niagara Falls Milling Company (Exhibit "B", R. 20–29). As the Tax Court pointed out (R. 93), none of the information required by the statute and the regulations was given in the claims represented by Exhibits A–1, A–2, A–3 and Exhibit "C". Exhibits A–1, A–2 and A–3 show only dates of payments of taxes by Niagara Falls Milling Company. (R. 13, 16, 19.) They obviously were inadequate in substance for purposes of Title VII and the deficiency was not supplied by the later so-called "Amendment to Claim" (Exhibit "C") filed by the petitioner.

Petitioner has not alleged or shown that the "Amendment to Claim" filed by it on P. T. Form 79 was an amendment to the separate claim filed on P. T. Form 79 (Exhibit "B", R. 20–29) by Niagara Falls Milling Company. It is not alleged that the claim filed on P. T. Form 79 in the name of Niagara Falls Milling Company (Exhibit "B", R. 20–29) was filed by or on behalf of the peti-

[19] The petitioner (Br. 10) misstates this figure as being $454,045.27.

tioner, and it could not, indeed, be treated as having been filed by Niagara as agent of the petitioner. Cf. *Savannah Sugar R. Corp.* v. *Commissioner*, 121 F. 2d 426 (C. C. A. 5th); *Arabi Packing Co.* v. *Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645. We know of no authority which would permit this petitioner to bring a suit on the claim filed by Niagara Falls Milling Company, a separate taxpayer, and we know of no authority which would permit the petitioner to treat the claim filed by Niagara as its own claim for purposes of filing an "Amendment to Claim". The courts have consistently held that a claim for refund under Title VII of the 1936 Act must be filed by the person who was liable for, and who paid, the tax to the Government. See *F. & F. Laboratories* v. *Commissioner*, 104 F. 2d 563 (C. C. A. 7th); *Oswald Jaeger Baking Co.* v. *Commissioner*, 108 F. 2d 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Southwestern Scram Co.* v. *Commissioner*, 108 F. 2d 843 (C. C. A. 10th), certiorari denied, 310 U. S. 628; *Arabi Packing Co.* v. *Commissioner*, *supra*; *Grain Belt Supply Co.* v. *Commissioner*, 109 F. 2d 490 (C. C. A. 8th), certiorari denied, 310 U. S. 648; *Zinsmaster Baking Co.* v. *Commissioner*, 109 F. 2d 738 (C. C. A. 8th), certiorari denied, 310 U. S. 653; *Fuhrman & Forster Co.* v. *Commissioner*, 114 F. 2d 863 (C. C. A. 7th), certiorari denied, 312 U. S. 686; *New Consumers*

Bread Co. v. *Commissioner,* 115 F. 2d 162 (C. C. A. 3d); *Alexander Smith & Sons C. Co.* v. *Commissioner,* 117 F. 2d 974 (C. C. A. 2d); *Lindner Packing & P. Co.* v. *Commissioner,* 118 F. 2d 656 (C. C. A. 10th); *Albert Miller & Co.* v. *Commissioner,* 120 F. 2d 789 (C. C. A. 7th); *Savannah Sugar R. Corp.* v. *Commissioner, supra.*

The statement (R. 33) which accompanied Exhibit C specifically requested:

> "that the amount of refund due the Angelus Milling Company, Inc., be determined and paid to it as a separate entity and that said claim be not commingled with the claim of the Niagara Falls Milling Company."

This language specifically disavows any purpose that Exhibit "C" should be treated as an amendment of the Niagara claim, Exhibit "B" (R. 20) and it attempts to divide the joint claim, Exhibit "A" (R. 11–19).

The reason for this belated insistence upon a separation is said to be (R. 33) that Niagara was adjudicated a bankrupt after the Niagara claim, Exhibit "B", was filed. It thus becomes clear that the present controversy had its origin in an attempt by petitioner to separate its claim from that of Niagara. Because of the consolidated books and the informal manner in which the affairs of the two corporations were managed (R. 96) petitioner's present difficulty is in stating a separate case for itself. But the difficulty is of

its own making, for the record indicates (R. 126–127, reprinted at pp. 13–14 of the Appendices to the petition) that the Commissioner did not require separate evidence from petitioner until petitioner insisted on separate treatment. Cf. petitioner's brief, pp. 25, 48.

Plainly the court below drew an unwarranted implication when it criticized the Commissioner (R. 138–139) upon the assumption that he had given the petitioner reason to suppose that he would consider its *separate* claim upon the merits, despite the absence of any records disclosing petitioner's individual transactions.

III

THE DEFECTS OF THE PETITIONER'S CLAIM FOR REFUND WERE NOT WAIVED BY THE COMMISSIONER

The statements, reiterated in varying form throughout petitioner's Statement of Case (Br. 3–15) and brief, that the Commissioner obtained all the data lacking on the face of the claim; that the Commissioner waived any formal defects in petitioner's claim; and that if the claims for refund filed by petitioner and Niagara Milling Company are considered together, petitioner's claim is not defective, are contrary to the findings of the Tax Court (R. 91–97). The contention that the Commissioner examined petitioner's claim on the merits has not been established.

The Commissioner's letter (Exhibit "D", R. 40–41) rejecting the claim filed by the petitioner

assigned as reasons for the rejection that (1) the amount for which refund is claimed was not paid as taxes to the Government by the petitioner; (2) the claim does not contain margins computed as required by law and applicable Treasury Regulations; and (3) the claim fails to furnish any other evidence establishing that petitioner bore the burden of the tax as required by law and applicable Treasury Regulations. The letter also states (R. 40):

> Since you did not pay the tax, refund of which is claimed, to the Government and you have not filed a true and complete claim in accordance with the requirements of Title VII of the Revenue Act of 1936, your claim is hereby disallowed in full.

The Tax Court found (R. 97) that there had been no waiver of defects in the claim by the Commissioner. Its determination is, we submit, final under the principle of *Dobson* v. *Commissioner*, 320 U. S. 489, and *Commissioner* v. *Scottish American Inv. Co.*, Nos. 52–54, this Term, decided December 4, 1944; for it is a conclusion, relating to tax administration, for which there is ample support in the record.

In connection with the contention that the Commissioner waived the defects in the claim, the petitioner relies upon certain affidavits (R. 126–129), reprinted at pp. 13–14, 16 of the Appendices to the petition for certiorari, and a letter (*ibid.* p. 15, R. 125) from a General Deputy Collector request-

ing an examination of certain books of Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc., in connection with the claim for refund F 5899 (Exhibit "B", R. 20) which had been filed by Niagara Milling Company (R. 96). The petitioner's claim for refund was F 10130. (R. 96, Exhibit "D", R. 40–41.) The Tax Court held (R. 96) that the letter did not support the petitioner's contention that the Commissioner gave consideration to the merits of petitioner's claim. The Tax Court also held (R. 96) "The affidavits are not convincing that the Commissioner waived any defects in the claim of this petitioner." and "There is no allegation in the petitioner's pleadings to the effect that the Commissioner waived defects and investigated the claim on its merits. On the contrary, the petition assigns as one of the errors [in the original petition (R. 8) and the amended petition (R. 66)] the action of the Commissioner 'in failing to give consideration to, and the usual hearings on, petitioner's claim'." (R. 97.)

The substance of the affidavits is that Raymond A. O'Connor, a certified public accountant, audited the books of petitioner and of Niagara Falls Milling Company (date not given); that between March 1, 1939, and March 22, 1939,[20] he obtained

[20] On these dates petitioner's claim was out of time (Cf. Pet. Br. 24, 25) and counsel has volunteered the information that the claim was not examined until 1940, after validation in the Revenue Act of June 29, 1939, *supra*, n. 10, p. 14, and after the time for filing claims had expired. Pet. Br., p. 48.

from the trustee in bankruptcy for Niagara "photostatic copies of the working papers of the representatives of the Bureau of Internal Revenue" (nature and contents not given); that the two corporations had common officers, a common bank account, and a common set of books; that in examining the claim for refund filed by Niagara the representatives of the Bureau "also examined the records of the Angelus Milling Co., Inc." (but for what reason is not stated); that he was unable to obtain the books of petitioner until about September, 1941, but did obtain "the essential figures [for what purpose not given] from his partner, Jackson A. Lyon", who in turn had obtained them from representatives of the Bureau; that he knows of his own knowledge that representatives of the Bureau investigated the refund claim of petitioner on its merits (which is inconsistent with the pleadings, R. 66) and sent a formal rejection thereof to the petitioner on May 24, 1941; that he is president of both companies and knows the Government offered Niagara a refund of $51,000 in processing taxes subject to offsets of $41,000; that this offer included tax payments made by petitioner and, had petitioner's claim not been included, "no refund whatsoever would be due Niagara Falls Milling Company"; and that a letter (referred to in the Tax Court's opinion (R. 96)) was addressed to Harry Dickinson, Lockport, New York, requesting permission to examine the general ledgers and minute books of the Angelus and Middleport cor-

porations "for the years 1935 and 1936"[21] in connection with the claim for refund "under Title VII, Revenue Act of 1936—Claim F 5899", which was the claim filed by Niagara Falls Milling Company (R. 96, 126–128).

The affidavit of the partner, Jackson A. Lyon, a certified public accountant, merely states that he held conferences on September 4, 5, 6 and 7, 1940, with representatives of the Bureau of Internal Revenue who "investigated fully the merits of the claim of Angelus Milling Co., Inc., for its refund of processing taxes illegally collected". This is a pure conclusion unsupported by facts and is inconsistent with the pleadings (R. 66).

The fact that the Collector examined the joint books of the companies for the purpose of auditing the claim of Niagara Falls Milling Company does not establish that he obtained adequate data, or any at all, relating to petitioner's separate claim. To obtain such data as "cost", "gross sales value", and other information necessary to compute the petitioner's statutory margins and the presumed extent to which it bore the burden of the processing tax—if any was paid by it—would require an investigation of data relating to petitioner's separate operations which the record shows were not even kept. (R. 96.)

[21] Refund is claimed for taxes alleged to have been paid from July 9, 1933, through November, 1935. (R. 13, 16, 19, 21, 24–25, 32, 50–51, 52, 63–65, 110–111.)

It appears that the Niagara Company was unable prior to the due date to complete the compilation of the data necessary to support its claim (R. 27, Exhibit "B"), which indicates that something more than a simple examination of the books was required. One set of books was kept for the two companies and since separate accounts resulted only from arbitrary allocations (R. 96), it cannot be assumed that the Commissioner's agents would be able to determine the merits of petitioner's separate claim from a mere examination of the consolidated books. Since Niagara's claim was apparently based upon the total transactions of both companies, it was unnecessary to make such a separation in examining its claim.

The Tax Court gave full consideration to the matter and held that the letter of the Deputy Collector did not support the contention that the Commissioner gave consideration to the merits of the petitioner's claim and that the affidavits were not convincing that the Commissioner waived any defects in the claim, especially in the light of the petitioner's having pleaded (R. 8, 66) that the Commissioner had failed to give consideration to its claim (R. 96–97).

Petitioner having failed to establish the premise that all of the evidence necessary to support its claim was ascertained by the Commissioner independently of the claim itself, there is no basis for the contention that in that event he would be held to have waived the defects in the claim.

Petitioner's entire argument assumes, contrary to the fact, that the premise has been established.

Moreover, no waiver case goes to the extent of holding that a mere discovery of the facts by the Commissioner will constitute a waiver. In the cases relied on by petitioner the Commissioner had taken some definite action, which was communicated to the taxpayer, showing that he was considering the merits. Here he rejected the claim because of its incompleteness.

The purported waiver would necessarily have included a waiver of statutory provisions, because Section 903 of Title VII of the Revenue Act of 1936 requires that "All evidence relied upon in support of such claim shall be clearly set forth under oath". Therefore petitioner must establish that the Commissioner's power to waive extends to the requirements of the statute itself. Petitioner is in error in asserting (Br. 27) that the above excerpt from Section 903 is the same provision found in Treasury Regulations from 1916 to 1932 (Br. 60, Appendix E). The regulations during that period required that "All the facts relied on in support of the claim should be clearly set forth under oath". The difference between stating "all the facts" and "all evidence" relied upon in support of the claim; the contrast between the statutory "shall" and the word "should", used in the regulations; and the superior force attaching to statutory requirements as compared with those contained only in regula-

tions, are quite obvious. These distinctions have been pointed out and emphasized in *New York Handkerchief Mfg. Co.* v. *United States,* 142 F. 2d 111 (C. C. A. 7th), certiorari denied October 9, 1944; *18th Street Leader Stores* v. *United States,* 142 F. 2d 113 (C. C. A. 7th), certiorari denied October 9, 1944; *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313, 317 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232, 235 (C. C. A. 8th); *Landrum* v. *Commissioner,* 122 F. 2d 857, 859 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. 2d 452, 454 (C. C. A. 6th); *Samara* v. *United States,* 129 F. 2d 594, 597 (C. C. A. 2d), certiorari denied, 317 U. S. 686; and *Cudahy Packing Co.* v. *United States,* 126 F. 2d 429 (C. C. A. 7th). All of these cases involved Title VII. The same distinction was made in *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 533.

There is no similarity here to the situation in *Tucker* v. *Alexander,* 275 U. S. 228. That case was fully explained in *United States* v. *Garbutt Oil Co., supra,* p. 534, and holds simply that a government official (counsel for the Government in that case) may waive the proper "form and contents" of a claim for refund, prior to the expiration of the period of limitation, when the only effect of an insistence upon a proper statement would have been "the resort of filing a new claim and pursuing it through the Bureau and

the courts" (302 U. S. 534). Here, on the other hand, the Commissioner's alleged waiver would have been an attempted abandonment of an absolute defense to petitioner's claim.

The extent to which compliance with the statute and the Regulations is required as a condition precedent to suit against the Government is still further illustrated by later decisions of this Court. See *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. These decisions, and particularly the decision in *United States* v. *Garbutt Oil Co.*, emphasize that conditions precedent to suit, prescribed by statute, cannot be waived by the Commissioner but must be complied with strictly, and that when insisted upon by the Commissioner strict compliance with his regulations is a necessary prerequisite to the maintenance of an action against the Government for the recovery of taxes illegally collected. See also *Weagant* v. *Bowers*, 57 F. 2d 679 (C. C. A. 2d); *Snead* v. *Elmore*, 59 F. 2d 312 (C. C. A. 5th); *Taber* v. *United States*, 59 F. 2d 568 (C. C. A. 8th), certiorari denied, 287 U. S. 636; *Dascomb* v. *McCuen*, 73 F. 2d 417 (C. C. A. 2d).

The cases relied upon (Br. 20, 37) by petitioner are distinguishable from the present one, in that

the Commissioner in each instance took action with respect to the merits, without objection going to the sufficiency of the claim. In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, the Commissioner admittedly had investigated and audited the taxpayer's books and records, examined the claim for refund on the merits, and notified the taxpayer of an overpayment of taxes which would be the subject of a certificate of overassessment; and a properly-amended claim had been filed before rejection. This Court expressly reserved the question whether the Commissioner's action in investigating the claim on the merits and reporting to the taxpayer the result of his inquiry was a waiver which would call for the return of overpayments though no amendment had been offered.

In the instant case there was not a determination on the merits; the claim was rejected; and no curative amended claim was offered.

IV

THE TAX COURT WAS WITHOUT JURISDICTION FOR THE FURTHER REASON THAT IT IS NOT SHOWN THAT THE PETITIONER PAID ANY AMOUNT TO THE GOVERNMENT AS TAX UNDER THE AGRICULTURAL ADJUSTMENT ACT

One of the reasons given by the Commissioner for his disallowance of the petitioner's claim, as found by the Tax Court, was that the petitioner had not paid to the Government the amount of tax for which the claim was made. This would be

true even if the data lacking in petitioner's claim were supplied from Niagara's. (R. 40–41.) The point was renewed in the Commissioner's motion to dismiss (R. 74).

The Tax Court found it unneeessary to discuss the point, but noted that the claims state that the tax was paid by Niagara. (R. 97.) However, it is clear that the Tax Court has no jurisdiction to entertain a suit based upon a claim filed by one who did not pay to the Government as a tax the amount sued for. Therefore the Tax Court's holding that there was no legal basis presented under which the petitioner was entitled to the refund of any amount of processing taxes paid under the Agricultural Adjustment Act is supportable on this independent ground.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

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FEBRUARY, 1945.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. (7 U. S. C., Sec. 623.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect

to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

SEC. 903. [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862].

FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Ad-

justment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C., Sec. 645.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed, is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during

such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting proce-

dure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for com-

modities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similiarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him

and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them:

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or col-

lected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. Sec. 649.)

Revenue Act of 1942, c. 619, 56 Stat. 798:[1]

SEC. 510. ABOLITION OF BOARD OF REVIEW AND TRANSFER OF JURISDICTION TO BOARD OF TAX APPEALS.

(a) Effective as of the close of business on December 31, 1942, the Board of Review, established under section 906 (b) of the Revenue Act of 1936, is hereby abolished and the jurisdiction vested in said Board of Review is hereby transferred to and vested in the Board of Tax Appeals.

* * * * *

(c) All proceedings pending in the said Board of Review on December 31, 1942, shall be deemed pending in and be transferred forthwith to the Board of Tax Ap-

[1] The name of the Board of Tax Appeals was changed by Section 504 of the Revenue Act of 1942 to The Tax Court of the United States.

peals, and shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein.

(d) All journals, dockets, books, files, records, and property, including office equipment of the said Board of Review, shall be transferred to the Board of Tax Appeals.

(e) Section 902 of the Revenue Act of 1936 (relating to conditions on allowance of refunds) is amended by striking out "Board of Review" and inserting in lieu thereof "Board of Tax Appeals (hereinafter referred to as the 'Board')".

* * * * *

(7 U. S. C. Supp. III, Sec. 648.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incum-

bent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 601. *Claim form prescribed.*—Claims for refunds of amounts paid as processing tax (as defined in section 913 (b) of the Act) shall be filed on P. T. Form 79. (See Chapter II of these regulations for general provisions relating to all claims.)

ART. 603. *Payment of tax.*—The claimant shall set forth in the claim complete data

with respect to the amount of processing tax which he has paid on the processing of the commodity. Each claim shall show as to each month's processing of the commodity: (1) the total tax liability returned; (2) the total amount of tax paid on the first domestic processing of the commodity; (3) the date and amount of each payment and the month for which paid; (4) that part of the total amount paid which represented the processing of the commodity for a customer for a charge or fee ("custom processing tax," see Chapter V of these regulations); (5) that part of the total amount paid which represented processing tax, as defined in section 913 (b) of the Act; and (6) the collector to whom each payment was made. In the case of tobacco the above data respecting tax payment shall be shown separately with respect to each market classification.

ART. 605. *Evidence as to margins.*—Section 907 of the Act provides that in claims for refund of amounts paid as processing tax it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin per unit of such commodity was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

There shall be submitted with, and as a part of, each claim, a statement showing the average margin for the tax period and for

the period before and after the tax. (For definition of "tax period" and "period before and after the tax," see section 907 (c) of the Act.)

The average margin for the tax period shall be computed as follows: Determine for each month during the period (1) the gross sales value of articles derived from the commodity processed during such month; (2) the cost of the commodity processed during such month; (3) the amount of processing tax paid with respect to the quantity of the commodity processed during the month; and (4) the number of units of the commodity processed during the month. The sum of the monthly gross sales values for all months during the period minus the sum of the monthly costs of the commodity processed for all months during the period, minus the sum of the processing taxes paid for all months during the period, and divided by the sum of the number of units of the commodity processed during all the months comprising the period is the average margin for such period. (For definition of "cost of commodity" and "gross sales value," see section 907 (b), paragraphs (5) and (6), respectively, of the Act.)

The average margin for the period before and after the tax shall be computed in the same manner as the average margin for the tax period, except that the processing tax does not enter into the computation.

In determining the average margin for the tax period, the "number of units of the commodity processed" shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "cost of the commodity

processed" shall be the cost of the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "gross sales value of articles" shall be the gross sales value of articles processed from the number of units of the commodity with respect to which the claimant actually paid the processing tax.

In support of such statement there shall be submitted, verified by appropriate affidavit, a detailed showing of the manner in which the margins for each month and the average margins for each period were ascertained, the data and records on which they were based, the location of such data and records, and all other related matters, including the accounting procedure of the claimant, which entered into the computations of such margins. All elements, factors, units, or measures entering into the computation of such margins, and any departure from uniformity in the use thereof in making such computation for any part of either period, must be fully explained and justified.

ART. 606. *Other evidence.*—In addition to the showing as to margins, the claimant is privileged to submit with his claim any other evidence available to him tending to establish that he bore the burden of the tax. Such evidence may be submitted to support the prima facie presumption, if such presumption is in favor of the claimant, or to rebut such presumption if it is against him. (See section 902 and subsection (e) of section 907 of the Act.)

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No. 610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ANGELUS MILLING COMPANY,
Petitioner

VS.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Prew Savoy, on behalf of the Angelus Milling Company, prays that a rehearing be granted in this cause, under Rule 33 of the rules of this Court. The judgment of this Court was entered May 21, 1945.

GROUNDS FOR REHEARING

I.

The nature of the one question answered adversely to Petitioner and not heretofore completely argued—because of the insufficiency of the allowed time for argument—requires a rehearing on that question alone.

Twenty minutes of the time allowed Petitioner for argument were required to be devoted to the question of the jurisdiction of this Court, due to what was said by this Court, in the granting of the Petition for a Writ of Certiorari, in *Commissioner v. Estate of Bedford*, No. 710, October Term, 1944. There was thus left an inadequate amount of time to permit Petitioner to make his argument in chief and also to make a complete reply in respect of all of the questions which seemed of concern to the Court in the course of Respondent's argument. Such time as remained was devoted by Petitioner entirely to the principal questions of law presented, all of which questions have been decided favorably to Petitioner, in the opinion of the majority of the Court. The time allowed Petitioner did not permit a review of the affidavits in support of the position that the Commissioner *in fact* completely examined Petitioner's claim on the merits, and that such an examination, if made, (the claim not having been acted upon during the statutory period for filing claims), in and of itself, constituted a waiver, in law, of any formal defect in the claim and of the Regulations.

The question of the sufficiency of uncontradicted affidavits presented by Petitioner, to establish the fact that the Commissioner examined Petitioner's claim on the merits, was omitted from the argument, in favor of the principal questions involved, for four reasons:

(a) The Circuit Court of Appeals had said: "Since the Tax Court disposed of the petition upon

motion to dismiss, and not after a hearing, the company is entitled to insist that we take in its favor any implications which can be drawn from this evidence; and we shall dispose of the appeal upon that assumption." As Respondent had not taken a contrary position, and in view of the correctness of this basic assumption, it was assumed that this Court would take a like view, if it reached this point, after considering the principal legal questions.

(b) The Tax Court had given Counsel for Respondent an opportunity, at the time of the hearing on the motion to dismiss, *or thereafter*, to file affidavits contradicting the affidavits filed by Petitioner, if upon a further examination, he should find the allegations contained therein to be untrue. Respondent had failed to file any such affidavits, because the facts alleged are true. Petitioner's claim was completely examined on the merits. Indeed, the Commissioner could not have concluded that Petitioner was not the taxpayer, as he did in his letter of rejection (R. 40), without such an examination.

(c) Nowhere in Respondent's Brief had it been urged that the Commissioner did not *in fact* examine Petitioner's claim on the merits. The brief was signed by five officials of the Department of Justice, whose integrity is such that no one of them would make such a representation to this Court, in the presence of the facts, and they did not. They merely relied on the conclusion of the Tax Court that Petitioner had failed to establish a waiver, a question of law as presented by Petitioner, and not of fact,

as Petitioner had not urged that there had been an expressed waiver.

(d) Petitioner believed that there was, and could be, no question that this Court, upon a motion to dismiss for lack of jurisdiction, would assume that the statements contained in the affidavits were true and would interpret them, together with the other evidence, in accordance with their intent.

The failure of this Court to accept the allegations in the affidavits as true, and its failure to understand their context in connection with the other evidence of record, with the result that, after deciding the fundamental legal questions involved in favor of Petitioner, the Court reached a conclusion denying Petitioner the right to a trial on the merits, was the result of the limited time permitted in argument. It is urged by Petitioner that, upon a short rehearing devoted to this question alone, the manifest error in the final conclusion of the opinion could be, and would be, corrected by this Court.

II.

The ultimate result reached by this Court in its opinion—after the principal questions of law argued had been decided—requires a rehearing to make this case stand for the principles involved and seemingly decided. The moral issue involved requires it.

This Court, in this case, has decided:

(a) That it has jurisdiction. *(The Bedford case, supra);*

(b) That the statute involved does not require that the evidence accompany the claim for refund;

(c) That the Commissioner may waive the regulations requiring that the evidence accompany the claim, i.e. may waive a purely formal defect in the claim, upon an examination of the claim on merits; and

(d) That it is not essential to the establishment of such a waiver that the Commissioner communicate his ruling on the merits to the taxpayer.

These were the principle questions of law argued and answered affirmatively, all in favor of Petitioner. The question left unanswered in *United States v. Memphis Cotton Oil Co.*, 288 United States 62, and involved in this case, and still for all practical purposes left unanswered, was and is whether, by a complete examination of a claim on the merits, as here, the Commissioner is *deemed*, as a matter of law, to have waived formal defects in the claim. This Court, in its opinion, virtually says that there may be such a waiver and then reaches the opposite ultimate conclusion in this case.

If it is assumed, and it should be, as it is proved by uncontradicted affidavits (the full portent of which can be made very clear on argument), that the Commissioner examined completely the Petitioner's claim on the merits, justice requires the conclusion that such an examination, continuing beyond the statutory period within which an amendment might be made, in legal effect, constitutes a

waiver of purely formal defects in the claim. A contrary conclusion, which permits Government officials to hold meritorious claims, defective only as to form, until the time to amend has passed; and then to reject the claim for a defect of form, refuse a refund, and prevent any Court hearing on the merits, all with the consent of this Court, will in the end produce only the greatest distrust of both the Executive and Judicial branches of our Government, as the comments on the opinion herein show.

The Circuit Court of Appeals said: "It makes no difference to the taxpayer what was his mistake; in either case he awakes to learn that it is never safe to put his trust in officials. . . . The result is often extremely harsh, as this case shows; but he who deals with the government must dot his i's and cross his t's; and if he assumes that he may rely upon the ordinary rules which apply as between individuals, he is doomed to disappointment."

After the decision of this Court, on May 28, 1945, there appeared the following, on page 1, column 1, of "What's Happening in Taxation and Government Regulation," a Prentice-Hall, Inc., weekly publication:

"LET THE TAXPAYER BEWARE!

"'It is never safe to place (one's) trust in officials.' Such is the advice of the Second Circuit Court of Appeals, now confirmed by the Supreme Court (Angelus Milling 5/21/45)."

Such a reaction has been general. It is, indeed, if true, a commentary on the integrity of our Gov-

ernment—in its relations with its citizens—to be sadly and seriously considered.

Such a conclusion is inevitable, unless this Court hears and reconsiders the one question left unargued in this case, namely, that the uncontradicted affidavits establish that there was a full examination of Petitioner's claim on the merits, and that such an examination, in legal effect, constitutes a waiver of the formal defects of the claim, and correctly determines that, under such circumstances, Petitioner is entitled to have a trial on the merits.

The conclusion required by the facts of this case was well expressed, in *Howbert v. Penrose,* 38 F. (2d) 577, where the United States Circuit Court of Appeals for the Tenth Circuit said, at page 581: "The defendant (the Government) concedes that he (the taxpayer) is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc. R. Co. v. United States,* 254 United States 141, 41 S. Ct. 55, 56, 65 L. Ed. 188), the Government ought to turn square corners when dealing with its citizens."

It is respectfully urged that this Court should, in this case, likewise apply the converse of the *Rock Island* rule, which has been cited and relied upon for more than 20 years, and not the conclusion reached by the Court below in this case. The only difference between the two cases is that, in this case, the Commissioner did not concede the merits, but this Court said in its opinion that this is not necessary.

Is it going too far to urge that this Court—after 149 years of decisions adjudicating disputes

between the Government and taxpayers—should now, if only on the grounds of fairness in relations between the Government and taxpayers—adopt the rule in the *Howbert* case?

If this rule of *Howbert v. Penrose, supra,* is applied, this Court must conclude that the examination of this claim on the merits, at which time the Commissioner obtained all of the data lacking on the face of the claim, required by the Regulations to accompany the claim, constituted, in legal effect, a waiver of the Regulations—a waiver of the formal defects in the claim. Only then will it have correctly answered the question left unanswered in *United States v. Memphis Cotton Oil Co., supra.*

This Petitioner is not asking this Court to review a fact question, tried by the Tax Court, or to make a refund, but is seeking only a review of a legal question and to be heard on the merits. This Court has before it all that the Tax Court had presented to it,—namely affidavits. The Tax Court was under the misapprehension that there could be no waiver of the Regulations, as a matter of law. Also, it failed to accept the facts in the affidavits as true. Since its major premise was wrong under the decision of this Court, and since it failed to accept the affidavits as true, its views are entitled to no weight. It is not a situation in which the case of *Dobson v. Commissioner,* 320 United States 489, applies. Again, let it be noted that the single judge who heard the argument,[1] unreviewed by the entire Tax

[1] See Griswold, The Need for a Court of Tax Appeals, Harvard Law Review, Volume LVII, No. 8, p. 1170, et seq., *re* one man Tax Court decisions.

Court, or by the Presiding Judge, since it was he who heard the case (R. 91), failed to accept as true the statements contained in the uncontradicted affidavits. Had he done so, and had he applied this Court's holdings on the other questions of law involved respecting waivers, he would have had to hold, as a matter of law, that Petitioner has the right to be heard on the merits.

Whether or not, on the basis of the uncontroverted facts, the Commissioner is to be deemed to have waived the formal defects of the claim is a question of law—not one of fact—finally to be determined by this Court, and not within the province of the Tax Court for final determination. *Trust u/w Bingham v. Commissioner*, No. 932, October Term, 1944.

If this Court fails to grant a rehearing and does as did the Tax Court, then it means that, on a motion to dismiss for lack of jurisdiction, affidavits are worthless and witnesses must be called, another most unfair result, contrary to usual practise.

If taxpayers cannot place their trust in Government officials and can no longer rely on uncontradicted affidavits to establish facts known by the Government to be true, in support of a motion to dismiss, the citizen and taxpayer indeed has cause for concern.

The moral issue involved in this Court's final conclusion goes much deeper than a mere decision in this case, important to the Petitioner alone. Every phase of our lives is being controlled by the Government because of war. It has been much controlled, and after the war may be more controlled,

in the name of social justice, all by Government officials. Is there to be no fairness in *all* these relations, too? Are the regulations governing them to constitute the rules of a card game, with all of the taxpayer's cards required to be face up, under the *Rock Island* rule, while the Government's cards are all face down?

Is a small taxpayer, in the presence of "complicated revenue measures" and voluminous and complicated Treasury Regulations, to be denied a hearing on a technicality, obviously overcome in connection with a hearing on the merits, and which can admittedly be expressly waived and is expressly waived whenever the Government official involved in his discretion is willing to do so? "Even tax administration does not as a matter of principle preclude considerations of fairness."

The substance of the conclusion, in the opinion, with respect to which no argument was heard is (1) that "the showing should be unmistakable that the Commissioner has in fact seen fit to dispense with his formal requirements and to examine the merits of the claim" and (2) that Petitioner failed to discharge the burden of so showing.

The showing is unmistakable that, the Commissioner examined Petitioner's claim on the merits, if the statements in the affidavits are assumed to be true, and the Government has never denied this to be a fact. The Commissioner could have rejected the claim without a consideration of its merits. He did not do so—but he used the formally defective claim as one of the two bases for rejection, *after* the examination. Does that not, in all fairness, con-

stitute an *unmistakable* waiver, if any effect is to be given to this Court's words herein on the subject of waiver?

The information respecting this claim did not reach the Commissioner in a roundabout way, nor were the facts just found under his roof. The Commissioner had his attention focused on the merits of this claim. The uncontradicted evidence is clear on the subject.

Joint returns of Petitioner and Niagara had been filed. (R. 110-111, 113-124.) Their joint claims and separate claims for refund had been filed (R. 11-39). Petitioner had allocated the tax paid by both, in its "Amendment to Claim." (R. 32-33.) The returns, claims and data were kept together, virtually as one file, in the custody of the same person. (Representations of Counsel who so found them, when trying to obtain Petitioner's returns. Counsel was not sworn, but so represented, without contradiction.) Both claims were examined on the merits by the same person, Lieben, (R. 125-129), who determined that Niagara was the taxpayer, and not Petitioner, (R. 40) a question to be determined on the merits, only after an examination of the merits.

The question then is to be resolved by the sufficiency of the affidavits. Otherwise, the principles recognized and adopted by the Court in its opinion, comprise but words.

A taxpayer may not call a revenue agent as a witness to establish any fact. (Rule IX, Rules of the Treasury Department, forbids his testifying.) On a motion to dismiss, must other witnesses be

called? The Circuit Court of Appeals thought not. Petitioner thought not. It has never been previously suggested.

What more was Petitioner required to do than present affidavits on facts known by Respondent to be true, and not contradicted, although every opportunity to contradict was given Respondent, in order to make the quoted words of this Court mean that there can be, in law, a waiver of formal defects in a claim, and of the Regulations, by an examination on the merits? Surely, the Commissioner is not required to say "I hereby waive the regulations," and this Court has so noted in its opinion herein.

The Regulations are designed both for the benefit of the administrating officials *and as a guide to the taxpayer*. "They are devised, not as traps for the unwary." *Tucker v. Alexander*, 275 United States 288, 231. If a claim does not meet their requirements, the Commissioner has the power promptly to reject the claim. If he holds the claim, chooses to examine its merits and does so, he should be *deemed* to have waived the formal requirements contained in the Regulations. Is there anything unfair about such a holding, insofar as the Government is concerned? Is not a contrary holding unnecessarily unfair to the taxpayer-claimant, who is forced by the Government, at its will or whim, to go through a period of years dealing with the merits of the claim, only to have it rejected for formal defects which are bound to be, and here were, cured upon such examination?

The sufficiency of the affidavits—the question of fairness involved—the question which was not ar-

gued—all are matters with respect to which Petitioner should be heard.

If ever the rights of individual citizens cried out for consideration, it is now. If the principle announced by the Circuit Court of Appeals and seemingly confirmed by this Court is to be, then the principle—to whom does the money belong, *ex aequo et bono*, means nothing, except when it is to be applied in the interests of Government, *United States v. Jefferson Electric Mfg. Co.*, 291 United States 386; the principles of fairness which prompted the declaration of our independence are to be henceforth forgotten; and the two World Wars fought to maintain principles of decency and morality were in vain.

In reaching its ultimate conclusion, this Court *must* have failed to note the implications which *must* follow, by reason of its failure (1) to assume the statements in the affidavits to be true, (2) to apply them with full effect, under the principles it had announced in its opinion, and (3) to conclude that the technical requirements of the Regulations and formal defects of the claim were in effect waived, so that Petitioner may be heard by the Tax Court on the merits.

A contrary conclusion is too serious a condemnation of this Court to contemplate. Counsel cannot subscribe to the quotation from Prentice-Hall, *supra*, in the absence of a full consideration of the question by this Court, upon a rehearing.

There is a vast difference between the Court reaching a wrong conclusion, rendering a wrong decision, of concern only to the parties, and the Court render-

ing a decision which the public believes lacks fairness and morality, because it adopts the principle that a citizen may not trust his Government. Furthermore, the converse—distrust—if this decision remains—is not to be limited to the Executive branch of the Government—since it will have received the stamp of approval of our highest Court. A moral question as important as is this one, remaining unanswered, is a serious menace to the fabric of our Nation.

Truly, the moral issue involved in the final conclusion of the opinion in this case requires a rehearing.

Respectfully submitted

PREW SAVOY,
Counsel for Petitioner.

Prew Savoy, Counsel for Petitioner, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

PREW SAVOY.

June, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 610.—October Term, 1944.

Angelus Milling Company, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 21, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a suit under Title VII of the Revenue Act of 1936, 49 Stat. 1648, 1747, 7 U. S. C. § 644 *et seq.*, for a refund of processing taxes paid under the Agricultural Adjustment Act of 1933. The problem of the case derives from the procedural requirements of a claim for such a refund.

The petitioner, Angelus Milling Company, known until June, 1933 as the Middleport Flour Mills, Inc., was a processor of wheat, with its principal office in Niagara Falls, New York. During the years for which the refund is claimed—1933 to 1936—its processing operations were closely connected with those of the Niagara Falls Milling Company. The two companies had the same officers, employees, and majority stockholder, and a joint bank account. They also had a common set of books, but the respective transactions of the two companies—purchases, costs of manufacture, sales—were entered in their separate accounts on the books. Between July 9, 1933, and January 31, 1935, the companies filed joint processing tax returns. Between February 1, 1935, and November 30, 1935, Niagara filed returns in its name on behalf of itself and petitioner.

After *United States* v. *Butler*, 297 U. S. 1, invalidated the processing tax, three claims were filed with the Commissioner on June 22, 1936, all stating the name of the taxpayer and claimant as "Niagara Falls Milling Co., Inc. and/or Middleport Flour Mills, Inc." Each of these claims is for only part of the period during which the tax was paid, and their total is $434,045.27. Admittedly the form of these claims did not satisfy the require-

ments of the statute[1] or the authorized Treasury Regulations.[2] They were filed on an old Form 843 and not on the required Form P. T. 79. While these claims were still undetermined, Niagara, on June 30, 1937, filed a claim in the sum of $436,231.73. This claim was in due form but was filed by Niagara on its own behalf alone. Thereafter, on August 15, 1938, petitioner filed a claim, designated "Amendment to Claim", for itself alone for the refund of $145,839.12. While this claim was submitted on Form P. T. 79, it failed to give the information required by the form and the regulations, containing merely an apportionment between Angelus and Niagara of the three earlier claims. An attached affidavit stated that this claim "was originally filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc." The Commissioner, on May 23, 1941, denied this claim.

To review this disallowance, petitioner brought proceedings in the United States Processing Tax Board of Review. A motion to dismiss, because of a fatal defect in the claim, was denied by the Board, but the Commissioner in his answer stood on his ground that the Board was without jurisdiction to entertain the proceedings. At this stage in the litigation Congress abolished the Processing Tax Board of Review and transferred its jurisdiction to the present Tax Court. That Court granted the Commissioner's renewed motion to dismiss, 1 T. C. 1031, and the Circuit Court of Appeals for the Second Circuit affirmed. 144 F. 2d 469. We brought the case here, — U. S. —, because conflict was urged with the decision in *U. S.* v. *Memphis Cotton Oil Co.*, 288 U. S. 62.[3]

Petitioner's claim for recovering processing taxes paid by it was properly rejected by the Commissioner if it did not satisfy

[1] Section 903 of Title VII of the 1936 Revenue Act, 49 Stat. 1648, 1747, requires that no refund be made or allowed "unless . . . a claim for refund has been filed . . . in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath."

[2] The applicable regulations provide for the making of claims on prescribed forms, presentation of the grounds urged, and submission of evidence, etc. Treas. Reg. 96, Arts. 201, 202, 601, 603, 605, 606. The only information furnished in these claims is the name and address of the joint claimants, and a statement of the dates and amounts of the tax payments made by the Niagara Milling Company.

[3] After we granted certiorari in this case, the same question of timeliness as to filing of the petition emerged as is raised in Commissioner v. Estate of Bedford, No. 710, decided this day. The decision in the *Bedford* case governs this.

the conditions which Congress directly and through the rule-making power given to the Treasury laid down as a prerequisite for such refund. Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials. *Tucker* v. *Alexander*, 275 U. S. 228, 231-232; *U. S.* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71; *U. S.* v. *Garbutt Oil Co.*, 302 U. S. 528, 533. Without needless elaboration, we conclude that there is nothing in what Congress has explicitly commanded to bar the claim. The effective administration of these modern complicated revenue measures inescapably leads Congress to authorize detailed administrative regulations by the Commissioner of Internal Revenue. He may insist upon full compliance with his regulations. See *U. S.* v. *Memphis Cotton Oil Co.*, *supra* at 71; *Commissioner* v. *Dunn-Wells Co.*, 321 U. S. 219, 223-224. It is hardly contended that the confusing series of petitioner's claims which we have summarized, whether singly or in conjunction, obeyed the regulations. For such default the Commissioner could have rejected the claims out of hand. He did not do that, and by what he did do he has given rise to the contention that he waived the requirement of his regulations. The basis of this claim of waiver is that the Commissioner through his agents dispensed with the formal requirements of a claim by investigating its merits.

Candor does not permit one to say that the power of the Commissioner to waive defects in claims for refund is a subject made crystal-clear by the authorities. The question has been somewhat complicated by cases involving amendments of claim. Thus, in *U. S.* v. *Memphis Cotton Oil Co.*, *supra*, a claimant's amendment was allowed because filed before his original claim was rejected on formal grounds. According to what was there said there can be no amendment after a rejection though the Commissioner had examined the claimant's books and tentatively found an overpayment. See *Edwards* v. *Malley*, 109 F. 2d 640; 10 Mertens, Law of Federal Income Taxation (1942) § 58.19. It smacks too much of the strangling niceties of common law pleading to find no existing claim to which a curative amendment may be attached, although there has been an examination of the merits, simply because of the prior rejection of a formally defective claim and yet find waiver of a formal defect merely because an examination of the merits by the Commissioner manifests consideration of the claim.

Treasury Regulations are calculated to avoid dilatory, careless, and wasteful fiscal administration by barring incomplete or confusing claims. *Tucker* v. *Alexander*, *supra* at 231; *Commissioner* v. *Lane-Wells Co.*, *supra* at 223-224. But Congress has given the Treasury this rule-making power for self-protection and not for self-imprisonment. If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude considerations of fairness.

Since, however, the tight net which the Treasury Regulations fashion is for the protection of the revenue, courts should not unduly help disobedient refund claimants to slip through it. The showing should be unmistakable that the Commissioner has in fact seen fit to dispense with his formal requirements and to examine the merits of the claim. It is not enough that in some roundabout way the facts supporting the claim may have reached him. The Commissioner's attention should have been focused on the merits of the particular dispute. The evidence should be clear that the Commissioner understood the specific claim that was made even though there was a departure from form in its submission. We do not think that the petitioner has made out such a case here.

The evidence of waiver largely rests upon a letter from a General Deputy Collector requesting an examination of certain books, and upon affidavits of two accountants, one an officer of the company, to the effect that the Commissioner examined petitioner's books in order to consider the claim. We agree with the Tax Court that the evidence is insufficient to establish waiver. The letter from the General Deputy Collector requesting petitioner's president to allow examination of the "records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc." was in connection with the claim which had been filed by the Niagara Milling Company. In view of the confusing identity of interest of the two companies, it is not unreasonable to attribute this inquiry, as did the Tax Court, to Niagara's claim and not to petitioner's. For similar reasons, the affidavits regarding the purpose of the Commissioner's representatives bear interpretation of a like significance.

In the *Memphis Cotton Oil* case, where an amendment was allowed out of time, the Deputy Commissioner, after an audit of the taxpayer's books, notified the taxpayer in writing that its refund claims had been considered and that its taxes had been readjusted in accordance with a proven overassessment. Similar evidence of preoccupation by the Commissioner with the particular claim and controversy has been offered in cases where waiver was recognized. See, *e. g., United States* v. *Elgin Nat. Watch Co.*, 66 F. 2d 344; *United States* v. *Humble Oil & Refining Co.*, 69 F. 2d 214; *Weihman* v. *United States*, 4 F. Supp. 155. To be sure, it is not essential for the establishment of a waiver that the Commissioner communicate his ruling on the merits to the taxpayer. But in the absence of such explicitness the implication that formal requirements were dispensed with should not be tenuously argumentative. No more than that can be squeezed out of the materials in this record. Thus it is claimed that the Commissioner offered a refund, subject to offsets, to the Niagara Falls Milling Company. But this rather confirms the indication the Commissioner was bent on Niagara's claim. The Commissioner may have acquired knowledge of petitioner's affairs but only by the way, incidentally to his investigation of Niagara's claims. Petitioner has failed to sustain his burden of showing that the Commissioner, by examining the facts of petitioner's claim in order to determine the merits, dispensed with the exactions of the regulations.

An additional argument of the petitioner need not detain us long. It urges that taking the claims filed by Niagara and petitioner together, they furnish all the data required by the regulations. But it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund. The protection of the revenue authorizes the Commissioner to demand information in a particular form, and he is entitled to insist that the form be observed so as to advise him expeditiously and accurately of the true nature of the claim.

Affirmed.

Mr. Justice DOUGLAS dissents.